

CARSWELL & CO.
TORONTO, ONT.
AND
EDINBURGH,
SCOTLAND.
LAW BOOK
PUBLISHERS,
DEALERS AND
BINDERS
++ ++

From

REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS.

BY

S. J. VAN KOUGHNET, M. A.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOLUME XXI.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 34 VICTORIA, TO EASTER TERM, 34 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO :
HENRY ROWSELL,
1871.

PRINTED BY HENRY ROWSELL, KING STREET EAST, TORONTO.

J U D G E S

OF THE

COURT OF COMMON PLEAS.

THE HON. JOHN HAWKINS HAGARTY, C. J.
“ “ JOHN WELLINGTON GWYNNE, J.
“ “ THOMAS GALT, J.

Minister of Justice :
HON. SIR JOHN ALEXANDER MACDONALD, K. C. B.

Attorney-General :
THE HON. JOHN SANDFIELD MACDONALD.



Digitized by the Internet Archive
in 2016

TABLE

OF

CASES REPORTED IN THIS VOLUME.

A.	PAGE	B.	PAGE
Agricultural Mutual Assurance Association of Canada, Crowley v. .	567	Burgess v. Burrows.....	426
Ainslie v. Ray.....	152	Burrows, Burgess v.....	426
Almonte, Corporation of the Village of, The, <i>In re</i> , Cunningham v. .	459	Butters v. Stanley et al.....	402
Armstrong v. Armstrong et al.....	4		
Arthur v. Monck.....	76	C.	
Austin, Beecher et al v.....	334	Caldwell, Hope v.....	241
		Campbell et al. v. Lapan et al.....	363
B.		Clarke v. Bates.....	348
Bank of Montreal v. Davy et al....	179	Cleaver et al., Corrie et al. v.....	186
Barrie, Corporation of the Township of, Respondents, v. Gillies et al., Appellants. (In Appeal)...	213	Clements v. Martin et al.....	521
Bates, Clarke v.....	348	Corrie et al. v. Cleaver et al.....	186
Beard, Snarr v.....	473	Crowley v. Agricultural Mutual Assurance Association of Canada...	567
Beaver and Toronto Mutual Insurance Co., Ellis v.....	84	Cunningham v. Corporation of the Village of Almonte, <i>In re</i> ...	459
Beecher et al. v. Austin.....	334	Curtelett, Foulds v.....	268
Bennett, Regina v.....	235		
Billington, Gray v.....	288	D.	
Blakely v. Hall.....	138	Davy et al., Bank of Montreal v....	179
Boys, Corporation of the Township of Nottawasaga v.....	106	Dawson v. Home Insurance Co....	20
Brown, Griffith v.....	12	Delany <i>In re</i> v. MacNabb.....	563
Bruce, Corporation of, Ross v....	41, 548	Duncombe, Linfoot v.....	484
		E.	
		Elgin, Corporation of the County of, Jenkins v.....	325

TABLE OF CASES.

E.		H.	
	PAGE		PAGE
Ellis v. Beaver and Toronto Mutual Insurance Co.....	84	Home Insurance Co., Richardson v.	291
Erwin v. Township of Townsend...	330	Hope v. Caldwell.....	241
Esquesing, Corporation of the Township of, Moore v.....	277	Hortop v. Taylor.....	56
Evans et al, Jackson v.....	33	Hunt, Farrell v.....	117
F.		I.	
Fargo, McQuarrie v.....	478	Irwin, Patterson v.....	132
Farrell v. Hunt.....	117	J.	
Fennell v. McGuire.....	134	Jackson v. Evans et al.....	33
Forsyth v. Galt et al.....	408	Jenkins v. Corporation of the County of Elgin.....	325
Foulds v. Curtelett.....	268	Jones v. Montgomery.....	157
Fraser v. West.....	161	Johnston and wife and Lewis v. McLellan.....	304
G.		K.	
Galt et al., Forsyth v.....	408	Kirby v. Hall.....	377
Gardner, Appellant. St. Catharines, Thorold, and Suspension Bridge Road Company, Respondents, v. (In Appeal).....	190	L.	
Gillies et al, Appellants, Corporation of the Township of Barrie, Respondents v. (In Appeal).....	213	Langford, Higgins v.....	254
Gilmour, Grant v.....	18	Law Society (Appellant), Regina (Respondent) v.....	229
Gore District Mutual Fire Insurance Co., McMillan v.....	123	Lepan et al., Campbell et al. v.....	363
Grand Trunk Railway Co., Soule v.	308	Lewis, Prince et al. v.....	63
Grant v. Gilmour.....	18	Lightbody, Hamilton et al. v.....	126
Grant v. Winstanley et al.....	257	Linfoot v. Duncombe.....	484
Gray v. Billington.....	288	Low v. Hicks.....	113
Green v. Hewer et al.....	531	M.	
Griffith v. Brown.....	12	Martin et al., Clements v.....	521
H.		Massie, McClevertie v.....	516
Hall, Blakely v.....	138	Massie, Shaw v.....	266
Hall, Kirby v.....	377	Maunder v. Royal Canadian Bank..	492
Hamilton et al. v. Lightbody.....	126	Mayville, Harling v.....	499
Harling v. Mayville.....	499	Mayville, Pattypiece v.....	316
Hewer et al., Green v.....	531	Memoranda.....	189, 454
Hicks, Low v.....	113	Monck, Arthur v.....	76
Higgins v. Langford.....	254	Montgomery, Jones v.....	157
Home Insurance Co., Dawson v....	20	Montgomery et al <i>In re</i> , and the Township of Raleigh.....	381
		Moore v. Corporation of the Township of Esquesing.....	277

TABLE OF CASES.

vii

Mc.

	PAGE
McArthur v. Webb et al	358
McClevertie v. Massie.....	516
McGuire, Fennell v.....	134
McKindsey (Respondent) v. Stewart (Appellant).....	226
McLellan, Johnson and Wife and Lewis v.....	304
McMillan v. Gore District Mutual Fire Insurance Co.....	123
MacNabb, Delaney <i>In re</i> v.....	563
McQuarrie v. Fargo.....	478

N.

Niagara District Mutual Insurance Co., Riach v.....	464
Nottawasaga, Corporation of the Township of, v. Boys.....	106

P.

Patterson v. Irwin.....	132
Pattypiece v. Mayville.....	316
Prince et al. v. Lewis.....	63

R.

Raleigh, Township of, and Mont- gomery et al. <i>In re</i>	381
Ray, Ainslie v.....	152
Regina v. Bennett.....	235
Regina (Respondent) v. Law Society (Appellant).....	229
Regina v. White	354
Regulæ Generales.....	436
Riach v. Niagara District Mutual Insurance Co.....	464
Richardson v. Home Insurance Co..	291
Ross v. Corporation of Bruce...41,	548
Royal Canadian Bank v. Shaw.....	455
Royal Canadian Bank, Maunder v..	492

S.

School Trustees of Burgess and Bathurst, Scott v.....	398
Scott v. School Trustees of Burgess and Bathurst.....	398

S.

	PAGE
Shaw v. Massie.....	266
Shaw, Royal Canadian Bank v.....	455
Shibley, Snyder v.....	518
Smith, Thompson v.....	1
Snarr v. Beard	473
Snyder v. Shibley.....	518
Soule v. Grand Trunk Railway Co..	308
Stanley et al., Butters v.....	402
Stewart (Appellant), McKindsey, (Respondent) v.....	226
St. Catharines, Corporation of the Town of, Wilson v....	462
St. Catharines, Thorold, and Suspen- sion Bridge Road Company, Re- spondents, v. Gardner, Appellant. (In Appeal).....	190

T.

Taylor, Hortop v.....	56
Taylor v. Municipal Corporation of Verulam.....	154
Thompson v. Smith.....	1
Toronto, Corporation of the City of, Corporation of the County of York v.....	95
Townsend, Township of, Erwin v..	330

V.

Verulam, Municipal Corporation of the Township of, Taylor v.....	154
---	-----

W.

Webb et al., McArthur v.....	358
West, Fraser v.....	161
White, Regina v.....	354
Wilson v. The Corporation of the Town of St. Catharines.....	462
Winstanley et al., Grant v.....	257

Y.

York, Corporation of the County of, v. Corporation of the City of Toronto.....	95
--	----

REPORT OF CASES

IN THE

COURT OF COMMON PLEAS.

MICHAELMAS TERM, 34 VICTORIA, 1870.

Present :

THE HON. JOHN HAWKINS HAGARTY, C.J.

“ JOHN WELLINGTON GWYNNE, J.

“ THOMAS GALT, J.

THOMPSON V. SMITH.

Goods sold and delivered—Rescission of contract—Non-acceptance of draft.

Defendant bought from plaintiff a quantity of oil at four months' credit. Plaintiff delivered oil, but defendant refused to accept a four months' draft for the price, alleging that it was not according to sample. Plaintiff assented and requested defendant to return oil, which defendant promised, but failed to do within a reasonable time. Before the four months had expired plaintiff sued for goods sold and delivered : *Held*, that the original contract had been rescinded, and that plaintiff might sue upon a new contract arising out of the retention of the oil by defendant.

Declaration on common counts. Plea, never indebted.

Trial at Cornwall before Hagarty, C.J.

Plaintiffs were dealers in oil at Montreal. Defendant lived in London. Plaintiffs' agent swore that he shewed defendant a sample of oil, and sold him 15 barrels at fixed price ; that no time of payment was fixed ; the usual terms for oil were at four months credit ; so he told defendant ; that a four months' credit was usually paid by note or bill from date of invoice ; that he could not swear that they spoke of a note. He said two and-a-half per cent. off for

cash, or four months' credit, and that he sold on the usual terms of the trade. The oil was sent and received by defendant, and plaintiffs drew on him a draft at four months. It was protested for non-acceptance.

Defendant objected to the quality of the oil, and a correspondence took place on the subject, and finally plaintiffs agreed to take back the oil, and directed defendant to re-ship. Their agent in London so told defendant, who said he would ship it by rail to plaintiffs. The agent offered to pay any expenses. Defendant said that was no matter, and that he had used two barrels, and he would owe plaintiffs something. He did not send them back, and, being called as a witness, said he was too busy to return them. After the lapse of some time the action was brought, but the writ was issued 23rd December, shortly before the expiration of the four months.

At the trial the defendant failed to prove his contention as to the inferiority of the oil, and the only question raised was, that this action was brought before credit had expired.

The objection was overruled, the Court considering that as the original contract was repudiated by defendant, and plaintiffs assented to his returning the goods, he could not now claim the four months' credit. Plaintiffs had a verdict.

In Michaelmas Term *Bethune* obtained a rule for a new trial for misdirection.

Scott shewed cause, and *Bethune* supported the rule.

The cases cited by counsel are referred to in the judgment of the Court, which was delivered by

HAGARTY, C. J.—It seems, from the cases cited by Mr. *Bethune*, that even when the purchaser refuses to give the note or accept the bill on the agreed terms of credit, he cannot be sued for goods sold until the expiration of the credit, but before that time the remedy must be by action on the special contract: *Paul v. Dod* (2 C.B. 800); *Ferguson v. Carrington* (9 B. & Cr. 59); *Strutt v. Smith* (1 C.M. & R. 312); *Wakefield v. Gorrie* (5 U.C. 159); *Silliman v. McLean*

(13 U.C. 544). Even where the goods were obtained fraudulently on a named credit, and without intention to pay, it was held that no action for goods sold lay till expiration of credit. The owners might have sued in trover, no property having passed by the fraud, but suing for goods sold established the sale, and the evidence of sale was also evidence of an agreement for a given time.

But it is argued, for plaintiffs, that defendant repudiated the first contract, and cannot now claim the benefit of the credit; and *Bartholomew v. Markwick* (15 C. B. N. S. 711) is cited by Mr. Scott, and relied on. The plaintiff and defendant entered into a treaty for sale and delivery of a large quantity of furniture, which defendant was to pay for half in cash, half by a bill at six months. Under this contract certain goods were delivered, some of which, to the value of £88, were retained by defendant. Some dispute arose, and defendant wrote to plaintiff that their way of business did not suit him, that he "had an account for a large amount of goods not purchased, and a demand made for payment opposed to treaty. I now close all further orders, and desire what I have not purchased may be taken off my premises." Neither cash nor bill was given for the goods kept.

Sir W. Erle says: "No doubt the plaintiffs could have maintained an action on the special contract, if the contract had remained open, and for the purposes of this case it is conceded that he could not have sued for goods sold and delivered. But it appears to me that the defendant's letter amounted to a putting an end to the contract, and that the plaintiffs had a right to treat it as rescinded, and to sue for the fair value of the goods which had been detained and kept."

We think this case governs that before us.

The defendant here did all in his power to repudiate the contract and induce plaintiffs to consent to its rescission. The latter agreed to this, and defendant was to send back the goods by rail. Had he done so at once, the matter would have ended. By delaying so to do beyond a reason-

able time it seems to us that a new contract arises on his part to keep the goods, and, on plaintiffs' assent thereto (testified by bringing this action), the law implies a promise to pay on request.

When the first bargain was rescinded by common consent the property in the goods would, it is presumed, revert in the plaintiffs, and might be at their risk. We think what subsequently occurred may fairly be held to create a new implied promise to pay, on request, the fair value of the goods.

The evidence certainly does not warrant our straining the law beyond the decided cases in favour of the defendant.

Rule discharged.

ARMSTRONG V. ARMSTRONG ET AL.

Tenancy at will—Ejectment by landlord against tenant's heirs—Estoppel—Proof of title.

A. entered into possession of land under the authority of, and by permission of B., who made him a verbal promise for a deed, to be executed as soon as he himself should receive a conveyance from M., whose tenant at will he was, and who had in the meantime died; *Held*, that A. having entered under B., his heirs were estopped from disputing B.'s title, and that they could be ejected by B. *Held*, also, that B. having entered under M. originally, notice of title "under M., who title from the Crown," was sufficient to enable B. to recover. *Pettigrew v. Doyle*, 17 C. P. 32, 459, distinguished.

EJECTMENT for the south-half of lot 28 in the 1st concession of Plympton.

Plaintiff claimed "through and under the late Edmund Murney, who derived title from the Crown."

Defendants, "besides denying plaintiff's title, asserted title in themselves, as heirs at law of the late David Orson Armstrong, who died intestate, and who derived title through and under the grantee of the Crown."

At the trial, at Sarnia, before Morrison, J., without a jury, letters patent were put in granting the land to Edmund Murney. The plaintiff was then called, and he

produced a paper writing, signed by Edmund Murney, as follows :

"I authorize Moses Armstrong to take possession, as my tenant at sufferance, of the west-half of lot number one in the fourteenth concession of the township of Brooke, the south-halves of lots numbers 19 and 20 in the 5th concesssion of the township of Moore, and 21 and 28 in the first concesssion of the township of Plympton, containing 700 acres.

" EDMUND MURNEY.

" Belleville, 22nd September, 1845.

" J. GERALD FITZGIBBON."

" When Moses Armstrong can secure to me a title of lot number one in the 3rd concession of the township of Huntingdon, in fee simple, from his child or children, then, and not till then, I am to give him a title of the above lots, seven years to be allowed for him to perfect his title to me.

" E. MURNEY.

his

" MOSES X ARMSTRONG.
mark.

" J. GERALD FITZGIBBON.

" WILLIAM CLOD.

" W. J. TAYLOR."

On the back of this instrument was endorsed as follows :

" BELLEVILLE, 25th January, 1847.

"I surrender to Edmund Murney the west half of lot No. 1 in the 14th concesion of Brooke, and the south halves of 19 and 20 in the 5th concession of Moore.

In presence of

" W. FITZGIBBON.

his

" MOSES X ARMSTRONG.
mark.

"The above lots surrendered as above, 25th January, 1847.

" In presence of

" W. FITZGIBBON.

his

" MOSES X ARMSTRONG."
mark.

Plaintiff, being sworn, said that he agreed to give to Edmund Murney 200 acres of land in Huntingdon, County of Hastings, for lots 21 and 28 in 1st concession of Plympton, 400 acres; that he himself moved on to lot 21 twenty-five years ago with his family, including his eldest son Orson, who was then a little boy, and he paid the taxes on both lots until 1857, when Orson, having married, he put him in possession of the south half of 28. When Orson was moving on to the lot he wanted to know if plaintiff would give him a deed of the lot, and plaintiff told him that he would give him a deed so soon as he (the plaintiff) should settle with Murney, if he Orson should live to enjoy it; and thereupon, as the plaintiff says, Orson moved on to the lot, and lived on it about seven years, when he died, leaving his widow and infant children (the defendants) him surviving. Plaintiff further said that after his son's death his widow came to him and asked him what she would do with the land; that one Davis, who was on the lot with Orson when he died, wanted to lease it; that plaintiff said she might lease it to him, and she accordingly did so for a term; when the lease was out she again called on plaintiff and asked if she might lease it again to Davis for a year or two more. Witness's children, as they came of age, including Orson, signed the deed, as plaintiff said, of the Huntingdon land to Murney. The son's widow had lately married again, and plaintiff in consequence brought this ejectment, after having served a demand of possession upon Davis, who was in possession under the widow.

Counsel for defendants moved a nonsuit, upon the ground that plaintiff was only tenant at sufferance of Murney, who was dead, and so the tenancy was at an end, and plaintiff had no title or right to possession of the land: also, that under the notice of claim the plaintiff could not succeed.

The learned Judge overruled the objections, saying that he would reserve leave to defendants to move upon them.

Defendants thereupon called Mary McMahon, the widow of Orson, who testified that when she married Orson in

1857 they moved on to the lot, and lived on it until Orson died. She then left it, and rented the place to Davis, without, as she said, asking any leave of plaintiff as having any right to the land. She said: "Plaintiff gave the lot, as far as he could, to Orson." Davis was called, and testified that the plaintiff had told him he gave the lot to his son Orson, and since Orson's death plaintiff said that he would never take it from his son's heirs. Plaintiff about a year ago wanted Davis to give up possession to him, but Davis refused, saying that he did not get possession from him.

John Smith was called, and testified that plaintiff told him that he had given the lot in question to his son Orson under some power he had by a will; that Orson had signed a deed of land in Huntingdon, and that the plaintiff gave this south half of 28 to Orson in consequence.

Allan Park, a son-in-law of plaintiff, testified that he had heard plaintiff say he intended giving this lot to Orson, and that since Orson's death he had said he would give the children, *i.e.*, Orson's children, their share.

John Nesbitt also testified that plaintiff had told him that he had given the property to Orson.

Upon this evidence being given the learned Judge entered a verdict for defendants, and reserved leave to plaintiff to move to enter a verdict for him, if the Court should be of opinion that he was entitled to recover.

In Easter Term last *Becher*, Q.C., obtained a rule *nisi* accordingly, to which *Robinson*, Q.C., shewed cause, citing *Doe Marlow v. Wiggins*, 4 Q. B. 367; *Doe Wright v. Smythe*, 4 M. & S. 348; *Penlington v. Brownlee*, 28 U. C. 189; *Drake v. North*, 14 U. C. 476; *Doe Bord v. Burton*, 16 Q. B. 808; *Doe Boulton v. Walker*, 8 U. C. 571; *Pettigrew v. Doyle*, 17 C. P. 34, 459.

Becher, Q.C., contra, cited *Pinero v. Judson*, 6 Bing. 210; *Doe Morgan et al. v. Powell*, 7 M. & G. 980, 8, 92; *Right v. Beard*, 13 Ea. 210; *Warren v. Fearnside*, 1 Wil. 176;

Duke v. Ashby, 7 H. & N. 600 ; *Doe Willis v. Birchmore*, 9 A. & E. 662 ; *Doe Newby v. Jackson*, 1 B. & C. 448 ; *Doe Gray v. Stanion*, 1 M. & W. 700 ; *Garrard v. Tuck*, 8 C. B. 231 ; *Lon. & N. W. R. Co. v. West L. R.*, 2 C. P. 553 ; *Mountjoy v. Collier*, 1 E. & B. 630 ; *Re Emery & Barrett*, 4 C. B. N. S. 423 ; *Sturgeon v. Wingfield*, 15 M. & W. 224 ; *Cole*, Eject. 217, 456 ; *Tay. Ev.* 118, 119.

GWYNNE, J., delivered the judgment of the Court.

It did not appear at the trial what, if any, interest Orson, as one of the children of Moses Armstrong, had in the land in Huntingdon which would render it necessary that he should have executed a deed to Murney of the Huntingdon lot, which it is said he did execute ; nor do I think it material to enquire what that interest was, if any. Assuming Orson to have entered into possession in virtue of a verbal promise of the father to execute to him a deed of the lot when *he* should receive a deed from Murney, Orson would in the meantime be tenant at will of the father, upon the authority of *Ball v. Cullimore*, 2 C. M. & R. 120 ; and if, which the evidence does not I think establish, the execution of the deed of the Huntingdon land by Orson was given as consideration for the promise of the father, that, as it appears to me, however much it might in a Court of Equity afford ground for the granting of an injunction, at the suit of the defendants, to restrain the plaintiff from proceeding with this action of ejectment, would not be sufficient to bar the plaintiff's recovery in this action at law.

But the defendants have not rested their defence upon the ground of their father Orson having purchased all the plaintiff's interest in this lot from him for the execution by Orson of the deed of the Huntingdon lands to Murney. The defence has been rested wholly upon this, that Orson's possession has been independent of the plaintiff, and that under these circumstances the plaintiff cannot evict the heirs of Orson, who died in possession, without shewing a superior title ; and it is contended that the plaintiff has shewn no title under Murney, the grantee of the Crown.

That the plaintiff entered into possession of the lot in question under the instrument executed by Murney, and that he retained possession and paid taxes until Orson entered, I think sufficiently appears. Now, whether the instrument, under which the plaintiff so entered into possession of the land, created a tenancy at will, or any other, and if any, what estate, or whether such estate determined by the death of Murney, and whether such death took place before or after Orson's entry, seem to me to be matters of no importance, if, as is contended by the plaintiff, Orson entered under the authority of and by permission of the plaintiff, and so as to constitute himself the plaintiff's tenant at will; for the cases clearly establish that, although a tenant at will or at sufferance cannot, as against his landlord, create a tenancy at will, yet he can as between himself and one entering under his authority. If, then, Orson entered under such circumstances as to have made him tenant at will of the plaintiff, a long series of cases establishes that the plaintiff is entitled to eject those claiming under Orson as heirs-at-law, or otherwise, upon determining the tenancy at will: *Doe Boulton v. Walker* (8 U. C. 571); *Doe Marlow v. Wiggins* (4 Q. B. 367); *Doe Willis v. Birchmore* (9 Ad. & El. 662); *Doe Bord v. Burton* (16 U. C. 808); *Drake v. North* (14 U. C. 476); *London and North West R. W. Co. v. West* (L. Rep. 2 C. P. 553); *Asher v. Whitlock* (L. Rep. 1 Q. B. 1); *Penlington v. Brownlee* (28 U. C. 189.) The principle upon which these cases proceed is, that one who enters upon land by the permission and under the authority of another cannot dispute that person's title.

The question then is, does the evidence shew that Orson entered upon the land in question in virtue of permission or authority derived from his father, and I must say that it appears to me to be beyond dispute that it does; and that, whether he gave any consideration which would be available to him or his heirs in equity for his father's promise, his sole reliance was upon the father's verbal promise to give him a deed when he, the father, should settle with Murney.

But it was contended that upon the authority of *Pettigrew v. Doyle* (17 C. P. 34, and in Appeal 459), the plaintiff, having given a notice of claim "through and under the late Edmund Murney, who derived title from the Crown," must shew a title good against every one, and cannot succeed upon the strength of a tenancy at will executed between the plaintiff and his son Orson, and determined by demand of possession. The decision in *Pettigrew v. Doyle* does not, as it appears to me, go to the extent of supporting this contention. That case decided that where, in answer to a title set up by plaintiff, the defendant shewed a lease from plaintiff himself to defendant, the plaintiff could not fall back upon a forfeiture of that lease by defendant, by breach of covenants, such title by forfeiture being held to be a *different* title altogether from that asserted in the notice. But the defendants here, instead of asserting title in themselves, as tenants of the plaintiff, claim adversely to him, and insist upon his shewing a superior title to that which they have by possession only. The plaintiff accordingly gives evidence that Murney was grantee of the Crown, as stated in his notice, and that he, the plaintiff, entered upon possession of the land in 1845, through and under Murney, and that he held that possession so acquired until he let his son Orson into possession in 1857, and so he says that the defendants, who claim through Orson, are estopped from saying that the plaintiff has not such a right of possession derived from Murney as entitles him to recover in this action, or from asserting that the estate, which the plaintiff originally acquired from Murney, is determined by Murney's death, or otherwise, for that Orson entered under that very title derived through the plaintiff from Murney. The plaintiff in effect says: "The objection which the defendants offer to the plaintiff's right to recover can only be urged, if there be anything in it, by persons whose possession is in no way in privity with the plaintiff, and, as the defendants are not such persons, they cannot be heard to urge the objection."

In *Doe v. Dyeball* (Mood. & M. 356), referred to with appro-

val in *Asher v. Whitlock*, by Cockburn, C. J., (L. Rep. 1 Q. B. 4), Lord Tenterden held that possession for one year by the plaintiff was sufficient to maintain ejectment against a person who entered upon him and turned him out, without any further proof of title. Now the possession which the plaintiff had under Murney was in 1857, when Orson entered, sufficient to have entitled the plaintiff to have recovered in ejectment against any person who had entered upon that possession otherwise than by title from Murney. It would have been sufficient to have entitled plaintiff to evict Orson if he had not entered under the authority of and by permission of the plaintiff, and it must continue to be sufficient to evict him and those claiming under him, he having recognised it by entering under the plaintiff. The plaintiff in fact recovers in virtue of the same right of possession which he had when he permitted Orson to enter, which then was, and therefore, as against Orson and those claiming title under him, still is, sufficient to entitle the plaintiff to recover against any one entering upon his possession not claiming by title from Murney. In *Pettigrew v. Doyle* Adam Wilson, J., says, at p. 39 : "My own opinion is, there would be no necessity for a landlord, on the expiry of a lease to defendant, to state that he claimed title by reason of the expiry of the lease, because by cesser of the term by lapse of time the term itself would be completely satisfied and ended ; but in the case of a forfeiture the estate is not by law absolutely cast on the lessor, it is a forfeiture or not at his election." The principle upon which *Pettigrew v. Doyle* rests is wholly different, as it appears to me, from that contended for by the plaintiff here, which is that of estoppel, that the defendants, claiming under one who entered under the plaintiff, cannot object that the possession which the plaintiff had, and which was derived from Murney, is not sufficient to entitle him to recover. To carry *Pettigrew v. Doyle* to the extent that it should govern this case would be to give it a construction not, I think, warranted by the reasons given for that decision by the learned Judges who decided it.

Rule absolute.

GRIFFITH V. BROWN.

Landlord and tenant—Price of good will of demised premises—Right of distress for.

Defendant, in consideration of the yearly rents covenants and conditions in the lease contained, leased certain premises to one M. at an annual rent, and as one of the covenants or conditions in consideration of which the demise was made, after reciting that M. had agreed to pay \$700, *by way of additional rent*, for the purchase of the good-will of the demised premises, M. covenanted to pay the \$700 in ten quarterly payments of \$70 each, with a proviso that in case of forfeiture of any of his covenants, the said \$700, or the balance thereof, was to become at once due and payable *by way of rent*, with a further covenant that if the term granted should be seized under execution or on attachment against M., or if M. should make an assignment or become bankrupt or insolvent, or take the benefit of any Insolvent Act, the then current quarter's rent should immediately become due and payable and the term become void. M. failed to pay any portion of the \$700, and after the accrual of the third quarterly payment became insolvent:

Held, that defendant had the right to distrain upon the goods on the demised premises for the three quarterly payments of \$70 each that had accrued due before the insolvency, but that, notwithstanding the different provisions contained in the lease, he could not, having regard either to the common law, the statute 8 Anne, ch. 14, sec. 6, or the 14th section of the Insolvent Act of 1865, distrain for the whole \$700.

SPECIAL CASE.

Trespass for unlawfully detaining, under colour of distress for rent, goods of the plaintiff.

By agreement, dated 23rd January, 1868, defendant agreed to lease to one Monro certain premises in the town of St. Catharines; and, in pursuance of said agreement, a lease of said premises was executed on the 1st April, 1868, between defendant and Monro, on certain terms, for a period of five years, and containing a covenant that if the term should be at any time seized or taken in execution, or in attachment, by any creditor of the said lessee, or if the lessee should make any assignment for the benefit of creditors, or become bankrupt or insolvent, or should take the benefit of any Act that might be in force for bankrupt or insolvent debtors, the then current quarter's rent should immediately become due and payable, and the said term should immediately become forfeited and void, but the next current quarter's rent

should nevertheless be at once due and payable. There was the further covenant, that whereas said lessee had agreed to pay the said sum of \$700 by way of additional rent for the purchase of the good-will of the grocery business, theretofore carried on in the said store, the said lessee thereby covenanted to pay, by way of additional rent, the sum of \$700 in ten quarterly payments of \$70 each, the first to become payable on the 1st day of June then next, and in case of forfeiture of any of the said lessee's covenants, the said sum of \$700, or the balance thereof, was to become due and payable by way of rent.

After the execution of the lease Monro entered into and continued in possession until 10th February, 1869.

On the 1st of February, 1869, Monro became insolvent and called a meeting of his creditors.

At the meeting of creditors plaintiff proposed to pay them twenty cents in the dollar on their claims against Monro, provided they would release Monro from all liability, and also provided Monro would (in consideration of plaintiff so paying said creditors and getting such a release as aforesaid for him,) assign to plaintiff all his goods, including all his stock-in-trade, household and shop furniture in said store and premises, leased by him from defendant.

On said 10th February, 1869, the creditors (other than defendant) of Monro and Monro accepted the proposition of plaintiff, and Monro immediately assigned and delivered up to plaintiff all his stock-in-trade, household furniture, and shop furniture in the store and premises leased from defendant, and plaintiff then became owner of the said stock-in-trade and shop furniture.

At the time of Monro's insolvency there was due to defendant the sum of \$350, being seven months' rent, and defendant contended that there were also due the \$700, by reason of none of the same having been paid.

On the 15th July, 1869, defendant distrained on the stock, &c., in the demised premises, for \$1050, being the seven months' rent and the \$700.

On the 22nd February plaintiff paid defendant \$350 for the seven months', which defendant accepted, such acceptance not to prejudice or affect this case.

The question for the opinion of the Court was, did the said sum of \$700, or any part thereof, become due by way of rent to defendant under the facts stated, and had the defendant the right to distrain for the said \$700, or any part thereof, and if so, what part?

The case was argued in Easter Term, 1869.

M. C. Cameron, Q.C., for the plaintiff, cited *Pollitt v. Forest*, 11 Q. B. 949; *Daniell v. Gracie*, 5 Q. B. 145; *Williams v. Hayward*, 1 E. & E. 1040; *Mechele v. Wallis*, 7 A. & E. 54.

W. Eccles, contra, referred to *Smith v. Maple Bank*, 1 T. R. 441.

GWYNNE, J., delivered the judgment of the Court.

We are of opinion, upon the facts stated in this case, that the ten quarterly payments of \$70 each for the purchase of the good-will of the business, which was purchased by the defendant from Brownlee for Monro, under and in pursuance of the agreement of the 23rd day of January, 1868, set out in the case, were payable as and by way of rent out of the premises demised, and were distrainable for as such when they respectively became due and payable.

The canon of construction is, "that all contracts should be executed *according to the purport and true intention of the parties upon the whole deed.*"

Here the intention of the parties is apparent beyond all reasonable doubt. By the agreement of the 23rd January, 1868, in virtue of which the defendant purchased from Brownlee the premises and the good-will, Monro covenants to accept a demise of the premises, where the good-will was enjoyed, for a term of five years, with a privilege of five additional years, at a rental of \$600 per annum, payable quarterly, and further, that he will pay to Brown for the good-will, *by way of additional rent*, the sum of \$700,

payable by ten equal payments of \$70 each, the first of such payments to become due and payable on the first day of June then next, being the same day upon which the first quarter of the \$600 per annum is also made payable.

Then, in pursuance of this agreement, the lease of the 1st day of April, 1868, is executed, Brown having in the interim, in virtue of the agreement of the 23rd January, acquired the premises and the good-will. By this indenture, Brown, "*in consideration of the yearly rents covenants, and conditions, hereinafter reserved and contained by the lessee, his heirs, executors, administrators and assigns, to be respectively paid, observed and performed,*" leases the premises to Monro, to hold for the full term of five years, with a privilege of five years longer, yielding and paying the clear yearly rent of \$600 during the whole term, payable quarterly on the first of June, September, December, and March, in each year; and, as one of the *covenants or conditions, in consideration of which the demise was made*, after reciting that he, Monro, had agreed to pay the \$700, *by way of additional rent*, for the purchase of the good-will of the business carried on in the demised premises, he covenants to pay, *by way of additional rent*, the sum of \$700, in ten quarterly payments of \$70 each, the first to become payable on the first day of June then next.

Now it appears to me to be very plain that the true intention of the parties, to be collected from these instruments, was that the tenant should enjoy the demised premises at the yearly rent, for the first ten quarters of the term, of \$880 per annum, payable quarterly, and of \$600 per annum for the residue of the term, also payable quarterly.

We are of opinion, therefore, that upon the 15th day of February, 1869, when the distress was levied, the landlord had a right to distrain upon the goods on the demised premises for the three quarterly payments of \$70 theretofore accrued due and payable, amounting to \$210. It was contended, upon the part of the landlord, that he had then

a right to distrain for the whole \$700, upon the ground that the covenant for the payment of the \$700 by instalments comprised in the lease contains the words following, viz., "and in case of *forfeiture*," by which we understand "*breach*," of any of the said lessee's covenants, the said sum of \$700, or the balance thereof, is to become at once due and payable *by way of rent*."

Now, among the covenants in the lease, the breach of any one of which, according to this contention, would cause the whole \$700 to become at once due and payable by way of rent, and distrainable for as such, are the following, namely, to pay rent, and to pay taxes, and to repair. If this contention be well founded, then the non-payment of the first quarter's rent, or of the first year's taxes, or a breach of the covenant to repair, would *eo instanti* of the breach of any of those covenants occurring, entitle the landlord to distrain for the full amount of the \$700, which by the demise is spread over the first ten quarters of the term *as a rent* for the occupation. With equal reason it might be held that a landlord could reserve to himself the right to distrain for the rent accruing due during the whole period of a term of ten or twenty years, upon default being made in payment of the first or any quarter's rent, or the first or any year's taxes. This is a proposition to which we cannot accede.

But the lease also contains a covenant that, "if the term hereby granted shall be at any time levied or taken in execution or in attachment by any creditor of the said lessee, or if the said lessee shall make any assignment for the benefit of creditors, or become bankrupt or insolvent, or shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, then the current quarter's rent shall immediately become due and payable, and the said term shall immediately become forfeited and void;" and it is contended that the facts stated in the case shew a breach of this covenant, which, *ipso facto*, has caused a forfeiture of the term, and that therefore the balance of the \$700, in excess of the three quarters' rent already accrued due,

became due and payable by way of rent reserved in that event. But, to follow this mode of reasoning to its legitimate conclusion, the balance of the \$700, in excess of the three quarter's rent accrued, only became due *by reason of* the forfeiture of the term, as a *consequence upon that event having taken place*. It did not accrue, therefore, *during* the term, but *upon and after* its *determination* by the forfeiture, and by reason of such determination having already occurred. Now, at common law, rent could only be distrained for *during* the term, and the Statute, 8 Anne, ch. 14, sec. 6, which enables landlords in certain cases to distrain after the determination of the term, only enables them so to do to recover *arrears* of rent that had accrued due *before* the *determination* thereof. This balance, therefore, which we conceive did not constitute an arrear of rent which had accrued due during the term, but became due and payable only under the covenant as a *consequence of the forfeiture of the term*, was not a sum which, either at common law or under the Statute, could be distrained for after the determination of the term.

However, the 14th section of the Insolvent Act of 1865 seems to conclude the question. It provides that "the preferential lien of the landlord for rent in Upper Canada is restricted to the *arrears* of rent *due* during the period of the year last previous to the execution of a deed of assignment, or the issue of a writ of attachment under the Act, as the case may be, and from thence so long as the assignee shall retain the premises leased."

I answer, therefore, the question submitted in the case, that in my opinion the defendant was entitled to distrain for the \$210 which had accrued due before *Monro* executed the deed of assignment in insolvency, and that judgment should be entered accordingly.

Judgment for defendant and \$210 damages.

GRANT V. GILMOUR.

Sale of land for taxes—Insufficient description.

Held, in ejectment, that a sale of land for taxes to defendant, the only description of which, in the *Canada Gazette* and in the treasurer's warrant, was "Pt. of S. pt. 111, 1st con. Tay, 40 acres, \$12.95," could not be supported, and that the plaintiff was therefore entitled to recover.

SPECIAL CASE.

EJECTMENT for part of lot 111., 1st con. Tay, being the west 40 acres of the south 160 acres of said lot.

It was admitted that plaintiffs were entitled to recover unless defendant could support his title under a tax sale: that in 1850 the sheriff of the county of Simcoe sold for taxes, to Donald McDonald, the southerly 160 acres of the lot, described by metes and bounds: that in 1859 the same sheriff sold for taxes, to William Proudfoot, the westerly 50 acres of the southerly 160 acres, described by metes and bounds. In 1865 it was advertised in the *Canada Gazette* that there would be sold for taxes land thus described: "Pt. S. pt. 111., 1st con. Tay, 40 acres, \$12.95." The warrant to the sheriff described the land thus:

Lot.	Con.	Acres.	
"Pt. S. pt. 111,	1	40	\$12.95"

and this land was sold by the sheriff to defendant on the 19th December, 1865, and a deed, dated 23rd January, 1867, executed to him therefor. This deed was not produced, although agreed to be added to the case.

Among many other objections to the defendant's title, was the objection that the description in the treasurer's warrant and sheriff's advertisement of sale in the *Gazette*, "Pt. S. pt. 111, 1st con. Tay, 40 acres, was bad and illegal, for uncertainty as to land to be sold.

Kerr, for the plaintiff, cited 29 & 30 Vic., ch. 53, sec. 205, repealing 22 Vic., ch. 55; *McDonald v. McDonell*, 24 U. C. 424; 27 Vic. ch. 19; *Hall v. Hill*, 2 E. & App. 569; *Mills v. McKay*, 15 Gr. 192; *Cayley v. Fisher*, 25 U. C. 405; *Knaggs v. Ledgard*, 12 Gr. 320; *Fraser*

v. *Mattice*, 19 U. C. 150; *McDonell v. McDonald*, 24 U. C. 74.

Meyers, contra, referred to C. S. U. C., ch. 55, sec. 31, sub-sec. 3.

HAGARTY, C. J., delivered the judgment of the Court.

Many objections are taken to this tax title. In our view it is hardly necessary to discuss many of them. We do not see how it is possible to support the sale to defendant. The only assessment or advertisement warranting the sale was of some 40 acres, not defined in any way except as being part of the south part of lot 111. No specific portion of the south part is pointed out, nor anything shewn to warrant any such portion as 40 acres being singled out of any larger quantity for assessment or sale. The lot may be assumed to be a 200 acre lot. On the face of the case, 160 acres were first sold for taxes; then 50 acres of, apparently, these 160 acres, were again sold for taxes; then we find the treasurer's warrant directing the sale of some undefined 40 acres on some part of the equally undefined southerly part of the lot. No one can understand whether the last 40 acres were part of the last 50 acres sold off the 160 acres or not, nor how or when such a quantity as 40 acres came to be separately assessed. This warrant seems to be the whole foundation of the proceedings; and we have no evidence of any previous assessment of this parcel of land. It was said by VanKoughnet, C., in *Hall v. Hill* (2 Err. & App. 572), "The treasurer's warrant is the foundation of the subsequent proceedings, irregularities in which, where they have occurred in acts merely ministerial or executive, the Courts have gone a long way to excuse. * * * I look upon the act of the treasurer, in determining what lands are in arrear for taxes and liable to sale, as a quasi-judicial act, and one which must be performed in accordance with the provisions of the Statute."

If, as a matter of fact, a person had purchased some specific 40 acres, or certain quantity of the south part of this lot, he never could have known from this warrant or

advertisement whether any claim existed against his property, or that his property was about being sold.

The sheriff's deed has never been made part of the case. It is not, however, likely to help the tax title, as it could hardly, of its own efficacy, convey any land not specifically assessed. A certificate, signed by the treasurer, and made part of the case, states that one Tully paid the taxes up to 1860 on 115 acres, part of the south 160 acres of the lot, and in March, 1862, one McCausland paid the taxes on five acres, part of the south 160 acres of the lot. These two parcels together make 120 acres: the residue of the 160 acres would be 40 acres. Apparently, the authorities considered it sufficient to declare that 40 acres, wholly unascertained or described, remained to be assessed.

We have looked at all the cases and Statutes cited, and, on the whole, find it impossible to support the defendant's purchase.

Judgment for plaintiff.

DAWSON V. HOME INSURANCE CO.

Marine insurance—Loss—Evidence of seaworthiness—Nonsuit—New trial refused.

In an action on a marine policy, insuring plaintiff against perils of the lakes, loss arising from unseaworthiness excepted, where the evidence shewed that the vessel was in excellent condition and seaworthy when she left port, and apparently up to the time of loss; that a squall struck her, and over three hours after it was found she was leaking much, in consequence of which she filled and went down, there being no charge or suggestion of fraud, malpractice, overvalue, or anything whatever against plaintiff, the only remarkable circumstance being that in the protest made by the master and mate there was no mention of the squall, nor was any cause assigned for the leak or consequent loss, *Held*, that the Judge was right in submitting the case to the jury, and that the evidence fully warranted the finding for plaintiff.

DECLARATION on a marine policy on vessel "Laura E. Calvin," from 1st May, 1869, to 3rd November, 1869, against the perils of lakes, rivers, canals, fires, and jettisons, averring a total loss during a voyage on Lake Ontario by perils insured against.

Pleas, 1, traverse of loss by perils insured against; 2, that perils or loss arising from rottenness, inherent defects, overloading, or other unseaworthiness, were excepted, and vessel lost by unseaworthiness; 3, that loss was by barratry.

Issue.

The case was tried at Ottawa, before Galt, J.

Evidence was given that in the spring the vessel was caulked and generally overhauled. The shipwright who worked at her so deposed. He said she was in very good condition, seaworthy, and as strong as wood and iron could make her, and about six years old; that vessels were classed "A 1" for seven years, and she was as good as "A 1." A witness also swore that during the season of 1869 she was sound, seaworthy and well found in every respect.

She left Kingston for Chicago, about mid-day, 3rd August, ballasted for heavy weather with stone. The master said he had superintended the ballasting, which was trimmed evenly over the bottom, and when she left she was in very good strong condition, and seaworthy. The wind was fresh, and increased towards evening; there was a heavy sea on, and she laboured hard with a cross sea all night. There was a roll of the sea next day. Next night wind again freshened; it was fair for her. The master left his watch at midnight, leaving the mate in charge. He went below and slept till 4 A.M., when he was called by the mate, informing him she was leaking. The pumps were set going, but the water gained on them, and at 7.30 she went down, ten or twelve miles from land, the crew leaving her in the boats. On Wednesday night, when the pumps were tried, she was not making much water. He said the rolling would have a great effect in straining her. If in ballast the rolling would strain her more than with a cargo.

The mate had left the country, and could not be found; but one Briggs, who happened to be on board, though not as a hand, but rather as a passenger, said that after the master went below a squall struck her, and made everything crack, and he considered this sufficient to cause a

leak ; that he went below to bed soon after the squall ; that she was on her beam ends, but continued to sail through the water ; she righted, and no sails were taken in.

Isidore Gland, a sailor on board, said he was at the wheel, and a squall laid her over considerably ; that she was down as far as the covering board ; that she was a stiff vessel ; he had to hold on hard ; he heard a crack ; that it must have been three hours or over before they found she was leaking ; that when first seen there were three feet of water in the hold.

The master and mate made a protest, in which no mention was made of the squall, nor of any bad weather, but stating the springing of the leak and its rapidly gaining on them. The protest did not affect to assign any cause for the leak or consequent foundering.

At the close of the case a nonsuit was moved on the ground that the evidence did not rebut the inference that the vessel was unseaworthy when she sailed, and nothing shewn to account for her loss.

Leave was reserved to move to enter a nonsuit, and the case proceeded.

A sailor on board a vessel which sailed the same day, some time after plaintiff's vessel, and picked up the crew, said that the night of the loss he may have been ten miles from her, and there was considerable of a jog of a sea ; that his vessel had no rough weather after leaving Kingston ; that when the " Calvin " left it blew hard, and his vessel did not then start because she was not ready and the wind blew too hard.

The learned Judge reported that he explained to the jury the law regarding unseaworthiness, and left them to say if they were satisfied that the vessel was seaworthy when she sailed, and that although they might think the squall did occasion the loss of the vessel that would not be sufficient unless the jury thought its violence sufficient to destroy a vessel really seaworthy.

The jury found for the plaintiff.

In Easter Term, *Anderson* obtained a rule on the leave reserved, or for a new trial on the law and evidence, and verdict being against the charge of the learned Judge.

Britton shewed cause. The rule is principally on the evidence not being sufficient to rebut the presumption of unseaworthiness, but it is submitted that the evidence given was sufficient for that purpose, and such evidence having been given, the question was then one for the jury. In *Foster v. Steele*, 3 Bing. N. C. 892, the question was there thought peculiarly for the jury.

The case is distinguishable from *Coons v. Aetna Insurance Co.*

If, however, a new trial should be granted, it could only be on payment of costs.

Anderson, contra. There are two points arising in the case: whether the Judge should have directed a nonsuit, or, if not, whether there should not be a new trial. Now the evidence offered did not rebut the presumption of unseaworthiness. There was no evidence of loss by perils of the sea, against which alone the defendants insure, the words "other perils" not being in the policy. But, further, the verdict is against evidence and the weight of evidence. There is nothing from first to last to account for the loss but the squall spoken of.

HAGARTY, C. J.—I am of opinion that the learned Judge was right in declining to nonsuit, and that the case had to be submitted to the jury. There is no charge or suggestion of fraud, malpractice, overvalue, or anything whatever against the plaintiff in this case. The defence seems rested on the alleged failure to supply a sufficient reason for the sinking of the vessel as she did, and that her so sinking, in the absence of a reasonable cause therefor, raises the presumption of unseaworthiness.

This case differs widely from *Coons v. Aetna Insurance Co.*, in this Court (18 C. P. 305, and again 19 C. P. 235), or the case of *Myles v. Montreal Assurance Co.* (20 C. P. 283). In both those cases there was almost a total absence

of the evidence which has been here given with some force, that the vessel when she sailed was in excellent condition, reasonably fit for the intended voyage.

Lord Campbell says, in *Small v. Gibson* (4 H. L. 418): "With regard to its (seaworthy) literal or primary meaning, I assume it to be now used and understood, that the ship is in a condition in all respects to render it reasonably safe where it happens to be at the time referred to, in a dock, in a harbour, in a river, or traversing the ocean;" and in *Knill v. Hooper* (2 H. & N. 284) the Court say: "Seaworthy or not is always a question for the jury, and in all cases the question for the jury will be, whether the ship was, at the commencement of the voyage in such a state as to be reasonably capable of performing it."

In forming my judgment I of course give the underwriters the benefit of the variance between this form of policy and that in use in England, not resting the case on the implied warranty of seaworthiness at commencement of voyage or at inception of risk, but on the broad issue raised on the pleadings, whether loss arose from unseaworthiness or not.

The doctrine of seaworthiness is fully discussed in 1 Arnould, 724 (1857).

I think that fair affirmative proof was here given of the general seaworthiness of this vessel, and that she left Kingston in a seaworthy state, so far as reasonable care and skill could provide. The owners seem to have done everything on their part to make her answer the requirements of the policy; and I think they have a right, especially when no bad faith is suggested or improper motive charged, to have the opinion of a jury whether the loss was or was not arising from some of the perils insured against, and not from alleged unseaworthiness.

Many cases have arisen in which vessels have sprung leaks and foundered from causes apparently inexplicable, and yet where no suspicion of fraud has been entertained, and when the weather encountered has been such that vessels of far inferior character and less supposed sea-

worthiness have experienced no difficulty or danger. The squall, here spoken of, may have strained the vessel, or started something; the ballast may have shifted, and caused some injury.

In the case of a vessel foundering with all hands, so that no account of the cause or manner of the loss could be given, if the assured proved that when last seen, or when she sailed forty-eight hours before from her last port, she was in good order, well found, and apparently seaworthy, I think a jury could properly be asked if they were satisfied that she was lost from some of the perils insured against, and not from inherent defect or other excepted cause, and that it would be impossible to hold that there could not be a recovery without positive affirmative proof of loss from a peril insured against.

A case of *Trew v. Railway Passengers Assurance Co.* (5 H. & N. 211, and in Error, 6 H. & N. 839), seems in point as to evidence. A policy was granted against injury by accident or violence, with a provision that no claim should be made in respect of any injury, unless the same was caused by some outward or visible means of which satisfactory proof could be forwarded to the directors, and that the assurance should not extend to any injury caused by natural disease, or by duelling, or suicide, &c., or wilful act of the assured in exposing himself to unnecessary danger or peril, or while in a state of intoxication. Deceased had gone on an excursion to Brighton. On Monday evening he left his friends, saying he intended to go to his lodgings, and would have a bath before returning to London. He went to his lodgings, which he left about seven, P.M., apparently going in the direction of the sea, and was not seen alive again. About eight, P.M., a suit of clothes, identified afterwards as his, were seen on the steps of a bathing machine. His watch and money were gone. Some weeks after his body was found a hundred miles off on the coast. On this Pollock, C. B., nonsuited the plaintiff (executrix) on the ground, amongst others, that there was no evidence his death was caused by accident within

the meaning of the policy. The Court of Exchequer upheld the nonsuit, mainly on the ground that "where the evidence is quite as consistent with one view as with the other, the party upon whom the onus lies fails to make out his case." The Court of Exchequer Chamber reversed this decision. Cockburn, C. J., reviews the evidence, and says: "The question ought to have been submitted to the jury whether he met his death by drowning. If they found that he died in the water, they might reasonably assume that he died from drowning. It is true that death occurs in the water in some instances from natural causes, as apoplexy or cramp in the heart, but such cases are rare, and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water or from natural causes. * * * We ought not to give to those policies a construction which will defeat the protection of the assured in a large class of cases."

I am not prepared to say, as a legal inference, that there is no evidence on which the jury might not, in such a case as this, fairly say that the loss was from one of the perils insured against. The alleged discrepancies in the evidence, and the absence of certain statements from the protest, were no doubt strongly commented on at the trial. I am most anxious that underwriters should receive all reasonable protection whenever claims strongly suggestive of fraud are advanced against them, as is unfortunately too often the case. This claim, as far as my judgment extends, seems quite free from suspicion, and I am not prepared to say that the jury erred in finding for the plaintiff.

I think the rule should be discharged.

GWYNNE, J.—This being a time policy, the defendants, as is the custom in all cases of time policies on our inland waters, have deemed it prudent to protect themselves, by the express terms of the policy, against any claim being made upon them in respect of any loss arising from

rottenness, inherent defects, overloading, or other unseaworthiness; and the plaintiff, accepting this policy, contracts that it shall not be construed to cover, or to give any protection for any loss arising from any of those enumerated causes, and that the protection of the policy shall extend only to other perils of the lakes, rivers, canals, fires, and jettisons.

The issues joined, upon which the question before us is raised, are a traverse of the allegation that the loss, in respect of which the action is brought, arose from any of the perils insured against, and an averment that it in fact arose from the excepted cause of unseaworthiness. The insertion of this clause creates no warranty whatever that the ship insured is at the time of the commencement of the risk, or that it shall be, seaworthy at all times, or at any time during the period named in the policy for the continuance of the risk. To an action upon this policy it would constitute no defence to plead that even at the time of the loss the vessel was unseaworthy: *Thompson v. Hopper* (6 El. & B. 937). The contract between the parties is not that the vessel shall be seaworthy, or, if unseaworthy, that it shall not be exposed to risk, but that no claim for a loss which is attributable to, or arises from, unseaworthiness, shall be made upon, or, if made, shall be enforceable against, the defendants: *Thompson v. Hopper*, in Exchequer Chambers (2 Jur. N. S. 93); and so the record in this case asserts, as the defendants' defence to this action, that the loss sued for has arisen from unseaworthiness. Mr. Anderson's contention, on behalf of the defendants, was, that the effect of this clause is, that in all cases it is necessary, to entitle the plaintiff to recover, he should shew positively an actual force and violence of the elements which is the very cause of the loss, and distinctly shew that the loss is not attributable to unseaworthiness. If this view be correct to the full extent to which I understand it to have been urged, then it would be impossible for a plaintiff to recover upon a policy in the terms of the present one, if the vessel and all hands

on board should go down in the middle of the lake unseen by any one. In such a case, I apprehend that *Green v. Brown* (2 Str. 1199) would be an authority equally binding in the case of a policy containing the exception of loss from unseaworthiness as in one containing the exception of loss from capture. The object of the insurer in inserting the clause is to protect himself from liability for a loss which arises from unseaworthiness; but the question whether or not it has arisen from that cause is to be tried, like any other question, according to the known rules of law, upon such evidence as may be sufficient to warrant a jury in drawing an inference in the affirmative or negative. In the *Quebec Marine Insurance Co. v. The Commercial Bank of Canada* (L. R. 3 Privy Council, 234), which was a voyage policy inserted in one of these printed forms of time policies containing a clause similar to that in this policy, Lord Penzance, in delivering the judgment of the Privy Council, says: "The enumeration of the losses, for which the underwriter here declares that he will not be responsible, is one that may perhaps have been introduced for either one of two reasons; first of all, the underwriter may have thought it right to say that should a loss occur which he attributes to the condition of the ship, he will not be placed in the position of being obliged to satisfy a Court or jury that the loss was brought about by the vessel being deficient in seaworthiness at the time when she sailed. He may wish to protect himself by stipulating that when any loss is attempted to be brought home to him he shall be at liberty to investigate the immediate cause of that loss, (quite irrespective of the time when the rottenness or inherent defect or unseaworthiness arose,) and be entitled to put his finger upon it and say, this is a loss that has not arisen by the pressure of the elements, but one which has in fact arisen from rottenness or inherent defect.

"There is another reason why he may wish to have this enumeration included in the policy, without intending to disturb the well-known warranty that attaches to all policies of this character: it is this, the warranty of sea-

worthiness would only protect him in case the defect exists at the time the vessel sails on her voyage; but the language of the enumeration is quite wide enough to protect the underwriters from losses of a similar character, *although it is proved to demonstration* that they did not arise until after the vessel sailed. This enumeration of excepted losses, therefore, very largely enhances the protection of the underwriters; and it is impossible to read this enumeration without seeing that the underwriters were bent on being specially protected by the terms of this policy."

It was argued in the Privy Council that, in the particular policy by reason of the special exemption provided in the excepted cases, the warranty of seaworthiness ordinarily implied in a voyage policy, was not to be implied. The contrary was decided by the Privy Council. The case is an instance of underwriters who had pleaded, but failed to establish, that the loss arose from the unseaworthiness, protecting themselves, notwithstanding, under the implied warranty.

In an action on a voyage policy, if it should appear that the ship, shortly after sailing, without visible or adequate cause, becomes leaky or otherwise incapable of performing the voyage insured, she shall be deemed to have been unseaworthy at the commencement of the voyage. The reason of this plainly is, that inasmuch as the springing a leak, shortly after leaving port without any visible or adequate cause, *is evidence* of unseaworthiness at the time of its occurring, there arises therefrom a presumption of fact which is recognized by law, that on the recent occasion of the vessel leaving the port she was unseaworthy: *Best on Presumptions*, 237.

It is from the visible evidence of unseaworthiness that the presumption arises that the vessel was unseaworthy when she shortly before left port, there being no visible or adequate cause to which to attribute the unseaworthiness as having arisen in the interval. In such a case the burden of proof is thrown upon the insured. In this time policy, however, the question not arising whether or not

the vessel was seaworthy at the time she commenced the voyage on which she was lost, and the fact of unseaworthiness at that time being a matter not in issue, and incapable of determining what is in issue, no such presumption of unseaworthiness arises from the given facts as in a voyage policy; nor does there exist any necessity for the raising such a presumption, for the facts from which, in a voyage policy, the presumption arises, shew equally in an action on a time policy, as in one on a voyage policy, evidence of the unseaworthiness at the time of the loss; but whether the vessel was or not unseaworthy at the time of the loss is not what is in issue upon this record. The assured has not undertaken that she should be seaworthy, nor have the defendants protected themselves from the liability in the event of the vessel being unseaworthy at the time of the loss: what the parties have agreed upon is, that the insurers shall make good all losses from perils of the lakes, &c., &c., *which are not attributable to unseaworthiness*; so that the insurers may be liable, although unseaworthiness at the time of the loss be established, if at the same time it be established to the satisfaction of the jury that the loss sued for is not attributable to, or occasioned by, that unseaworthiness. I concede, then, that upon this record the onus lies upon the plaintiff to shew that the loss arose from the perils insured against, and not from unseaworthiness; and that, if the evidence establishes no more than that the vessel sprang a leak shortly after leaving the port of Kingston, without any visible or adequate cause, under such circumstances as, if the policy was a voyage policy, and the point in issue was unseaworthiness at the commencement of the voyage, would cast upon the assured the onus of proving that she was seaworthy when she sailed: in that case the plaintiff should be nonsuited, or a verdict should be entered for the defendants. In such a case there would be nothing to be left to the jury from which they could properly infer that the vessel was lost from any other cause than unseaworthiness. This was the opinion of the Court, when differently constituted, upon the

first trial in *Coons v. The Ætna* (18, C. P.), which opinion was adopted by us upon the second trial of that case, and followed by us in the recent case of *Myles v. The Montreal Insurance Co.* (20 C. P.) In *Pridham v. The Ætna* and *Pridham v. The Home Insurance Co.*,* we were asked to apply these decisions to those cases, but we declined doing so, because we were of opinion that in those cases there was evidence from which the jury could infer that the loss was attributable to the perils insured against, and not to unseaworthiness. In the case now before us, the plaintiff seems to have taken a correct view of what it was necessary for him to establish, for he seems to have given all the evidence in his power—of the condition of the vessel shortly before the loss, and of the weather, and of its effect upon the vessel from the time of her leaving Kingston, two days previously, until the loss; and the only questions which arise are, whether, firstly, the evidence was such as to justify the learned judge who tried the case in submitting it to the jury; and, secondly, if it was, whether it was sufficient to justify the verdict rendered. Upon the first point, I entertain a strong opinion that the learned judge would have greatly erred if he had withheld this evidence from the jury, and had nonsuited the plaintiff. I place no value upon the evidence given as to the seaworthy condition of the vessel at the commencement of the season when the policy was effected, for her condition then could throw no light upon the *causa causans* of the loss which occurred in August. Evidence, however, of the condition of the vessel, when she left the port of Kingston upon the voyage on which she was lost, was given and was admissible, not for the purpose of establishing, as if it was the material fact in issue, that she was seaworthy then, but for the purpose of enabling the jury to draw the inference whether, if seaworthy then, she continued to be so until the time of the loss, which occurred so shortly after, except in so far as she may in the interval have been made otherwise by the

* Not reported.

pressure of the elements ; and to enable them to weigh the sufficiency of the evidence offered to explain the cause of the loss. If it be a fact that there was no visible or adequate cause for the vessel springing a leak after she left Kingston, it would be for the jury and not the judge to determine the value of the evidence offered of the seaworthiness of the vessel at the time of her leaving Kingston ; but the plaintiff offered further evidence, namely, of the condition of the weather, and of the vessel straining for some time in a cross sea until finally she was, as the evidence stated, struck by a squall and thrown over on her gunwale ; and some evidence was given to the effect that the leak was attributable to the injury received by the shifting of the stone ballast during the squall. I cannot see how it would be possible, consistently with *Foster v. Steele* (3 Bing. N. C. 892), and *Thompson v. Hopper* (6 E. & B., and in the Exchequer Chamber, 5 Jur. N. S.), to justify the withholding this evidence from the consideration of the jury. Whether their verdict is or is not against the weight of the evidence, is another question. Whatever my first impression of the evidence may have been, I cannot say, after reading it over two or three times, that I am satisfied the jury have erred. It is not suggested that the defendants can add anything new to the evidence. There is no suggestion of misdirection ; indeed it would be impossible for the defendants to complain of the manner in which the case was submitted to the jury, assuming that there was evidence sufficient to warrant its being submitted to them ; and I do not think that we should be justified in depriving the plaintiff of the benefit of his verdict, and in exposing him not only to the delay and expense of a second trial, but to the risk, perhaps, of being unable to secure the attendance of the witnesses already examined, unless we feel a strong conviction that the verdict is not supported by the evidence, and that the defendants are unjustly prejudiced by it. I cannot say that I do entertain such a conviction, and I think therefore that the rule must be discharged.

GALT, J.—This was a case tried before me at Ottawa, and the contention at the trial was, whether or not the loss was occasioned by the unseaworthiness of the vessel. At the close of the plaintiff's case Mr. Anderson moved for a nonsuit, on the ground that the evidence did not rebut the inference that the vessel was unseaworthy when she sailed, as there was nothing shewn to account for her loss. I declined to accede to this view and left the case to the jury. There was some evidence given on the part of the defendants, and the question turned on the view which, under all the circumstances of the case, the jury took of the evidence as to the cause of the loss. I left the case to them with a charge which is not complained of; and as in my opinion there was evidence to go to the jury, which, if believed by them, was sufficient to account for the loss by some of the perils insured against, I do not now see how we can interfere with their verdict.

Rule discharged.

JACKSON V. EVANS ET AL.

Sale of goods subject to lien—Notice to purchasers—Right of action against.

Held, that where there was an express agreement between the owner of certain logs and the plaintiff that he would sell the logs subject to plaintiff's charges thereon for rafting, which agreement was communicated to defendants, the purchasers, who promised plaintiff, before the delivery by him to them of the whole of the logs, to pay said charges, plaintiff was entitled to maintain an action against defendants for non-payment of the same.

APPEAL from the County Court of the County of Norfolk.

The action was brought to recover compensation for driving certain saw logs down a stream called "Big Creek," under the following circumstances: One Whiteside had a quantity of saw logs in "Big Creek," and he employed the plaintiff to drive and raft them, upon an agreement, as sworn to both by the plaintiff and Whiteside, that if

Whiteside shipped the logs himself he would pay the plaintiff, and if he sold, without shipping himself, he would sell subject to his (plaintiff's) charges.

The declaration contained two counts; the first, after setting out the special agreement between Whiteside and the plaintiff, that "the said Whiteside sold the said logs to the defendants subject to the said charges and to the plaintiff's lien therefor, of which the defendants had notice, and the defendants requested the plaintiff to give up the said logs to them without payment of his said charges, and without retaining possession thereof in respect of his said lien, and promised the plaintiff that, in consideration of the plaintiff so giving up to them the said logs, they would pay the plaintiff his just charges, and the plaintiff thereupon gave up the said logs to the defendant, and did not retain possession thereof in respect of his said lien, and all things happened, &c."

There were also the common counts for work and labour.

To this declaration the defendants pleaded nine pleas; six to the first count and three to the second. The first and second pleas were clearly disproved, and the defendants, on whom the issues rested, gave no evidence on the eighth and ninth pleas. The third plea to the first count was, that Whiteside did not sell said saw logs to defendants, subject to plaintiff's said charges or lien, as in said first count alleged. The fourth plea denied notice of the plaintiff's having any such charges or lien upon the said saw logs, as alleged, when they purchased from Whiteside. Fifth plea, *non assumpsit*. Sixth plea, that plaintiff did not give up said saw logs to defendants, as alleged. Seventh plea, to the second count, never indebted.

From the evidence given at the trial it appeared that about the 1st of April, 1867 or 1868, a freshet took place in "Big Creek," the effect of which was to bring down a number of logs belonging to Whiteside, and to mix them with a drive of logs belonging to other parties, which was under the charge of plaintiff. Finding this to be the case, plaintiff agreed to bring them to Whiteside's pond, which

he did ; " then," as he stated, " he wished me to run them through with my own. One of his booms broke, and a number of his other logs got mixed with mine. He then agreed with me to take them all down ; if he shipped them himself he would pay me, and if he sold them he would sell subject to my charges. This was about the 15th of April : the usual rate, 80 cents per M. ; but nothing was said about the price. I went on taking charge of the logs. All were delivered by the 1st of October to Murphy, the agent of Killmaster ; two-thirds were delivered in June. Whiteside told me in May, 1868, that he had sold to Killmaster ; that is the reason I delivered logs to their agent. About 1st July, 1868, I went to Henry J. Killmaster and wanted him to settle with me. He said he had no money, but would pay me in a few days ; and when I subsequently called, he said he had made up his mind not to pay me at all."

Whiteside said : " I had, in 1867, about 120,000 feet of lumber afloat. My lower boom broke, and my logs got down creek. I arranged with Jackson to take them down. If I shipped them myself I was to pay him ; if I sold I would sell subject to his charges. The logs at that time were my property, and marked " J. W. " I subsequently sold in May, 1868, to defendants. Henry Killmaster was the one I made the bargain with. I told him that I sold subject to the charges for rafting ; it was well known to both of us that David Jackson had taken them down. Joseph Jackson was there ; he was trying to purchase."

Joseph Jackson said : * * * " On 13th May, 1868, Henry Killmaster went to Whiteside's store. I asked Whiteside, in Killmaster's presence, " What are you going to do about these logs ? " He replied, " I have just sold them to Mr. Killmaster." Whiteside said to Killmaster, " You understand this matter, that you are to pay for the running of these logs ? " Killmaster replied, " I understand."

For the defence, Henry J. Killmaster, one of the defendants, was called. He said : " I never agreed to pay Jackson,

and never employed him : his name was never mentioned. I never told Whiteside I would pay Jackson. * * * I positively refused to recognize Jackson's claim." Cross-examined : " On the 16th May, 1868, made arrangement with Whiteside at his office : I never told Murphy about it. The result of the arbitration was, that Jackson failed to recover as against Whiteside. I forget whether I was sworn as a witness or not on that occasion."

The foregoing was the only evidence material to notice.

The following was the Judge's charge : " After reviewing the evidence fully, I told the jury that there was evidence sufficient to entitle the plaintiff to recover either on the special count or on the count for work and labour, if they believed the evidence offered on behalf of the plaintiff, and left the case to the jury on the evidence."

The jury found in favour of the plaintiff.

In the following Term a rule *nisi* was obtained, on behalf of the defendants, to set aside this verdict, and to enter a nonsuit on the following grounds : 1. That the evidence did not establish a lien as between Whiteside and plaintiff. 2. No evidence that defendants took the logs subject to any lien in favor of plaintiff. 3. No evidence of any request by defendants to plaintiff to give up his lien, or any agreement on their part to pay plaintiff his charges for running said logs. 4. No privity of contract between plaintiff and defendants proved to entitle plaintiff to recover under any count of the declaration. 5. A writing necessary under the Statute of Frauds to entitle plaintiff to recover, and no such writing was proved. 6. No evidence entitling plaintiff to recover on any count.

Or a new trial on the law, evidence, and weight of evidence ; and also for misdirection and non-direction, on substantially the same grounds.

This rule was subsequently, after argument, discharged, whereupon the defendants appealed.

Anderson appeared for the appellants, and *C. S. Patterson* for the respondents.

GALT, J.—From the foregoing statement of the evidence it is manifest that the plaintiff delivered the logs to the agent of the defendants upon the statement made to him by Whiteside that he had sold the logs to defendants, subject to his charges, and the question before us is, whether, upon such an arrangement and the subsequent promise made to him, in July, 1868, by Killmaster, the plaintiff is entitled to maintain this action. Whiteside, in his evidence, swears positively that his bargain with the defendants was that the logs were sold subject to the plaintiff's charges, and Joseph Jackson corroborates this statement, and states that Killmaster admitted in his presence that such was the bargain. It is true that Killmaster expressly denies this; but the finding of the jury is against him. We must therefore assume that such was the bargain. It was, however, urged at the trial, and again insisted on before us, that such an agreement would not give a right of action to the plaintiff against the defendants for want of any privity between them. It is to be observed that there was no bargain between Whiteside and the plaintiff as to any specific price to be paid for rafting the logs, the agreement being, as stated by Whiteside, "if I shipped them myself I was to pay him, if I sold I would sell subject to his charge." It was therefore not possible for Whiteside to do more than to sell the logs to defendants, leaving them to settle with the plaintiff for the rafting. It was not a promise to Whiteside to pay the plaintiff a certain sum of money, but it was a purchase from Whiteside of his property in the logs subject to certain charges to be paid to the plaintiff.

It appears to me that this case is very similar in principle to an action for freight brought by the master of a ship to recover freight where the goods have been delivered before the freight was paid to a person *not* the original consignee, but a purchaser from the consignee, when it was stated in the bill of lading that the freight was to be paid by the consignee or his assignee, he or they paying freight for the said goods. In *Cock v. Taylor* (13 East.

399), which was a case of that description, it was urged that there was no privity of contract between the purchaser and ship owner, though it was admitted that the latter was not bound to deliver before the carriage price of the goods was paid, and that the parting with his lien was a good consideration for a subsequent express promise to pay the carriage price. (Such a provision was wanting in *Cock v. Taylor*, but according to the plaintiff's evidence was made in this case.) Lord Ellenborough, in giving judgment, says: "It appears to me that though there was no original privity of contract between these parties for payment of the freight, yet the taking of the goods from the ship by the purchaser, under the bill of lading, is evidence of a new agreement by him as the ultimate appointee of the shippers to pay the freight due for the carriage of such goods, the delivery of which was only stipulated with the shippers to be made to the consignees named in their bill, or their assigns, he or they paying freight for the said goods." Le Blanc, J., says: "The purchaser must have understood at the time that the goods were liable to be detained for the payment of the freight, if it were not paid before delivery; and he receiving them from the master, and the master parting with his lien and giving them up to the purchaser at his request, is evidence of a new contract between them that the purchaser would pay the freight." Bayley, J., says: "I think the purchaser's taking the cargo from the master who had a lien on it was evidence of their agreement, upon the master's delivering up the goods without receiving the freight, to pay the freight which should be due, and without which they had no right to take the goods." The case of *Dougal v. Kemble* (3 Bing. 383), expressly recognizes the case of *Cock v. Taylor*, which Park, J., states "has remained unimpeachable."

It is true that the above cases have reference to the well-understood doctrine of the lien which the captain has for freight, and it may be urged that in the absence of any express agreement for a lien in this case no such right

existed; but I think that, considering the agreement between Whitesides and the plaintiff, which was communicated to the defendants, and also the express promise to pay made by defendant to plaintiff before the whole of the logs were delivered to the defendants, the plaintiff is entitled to maintain this action. In the case of *Wilson v. Kymer* (1 M & S. p. 157), in which the case of *Cock v. Taylor* was considered, it was held that if the defendant received goods, although not under a bill of lading, he might be sued by the captain on an *implied* promise (evidenced by previous dealings) to pay freight, and here there was, as found by the jury, an *express* promise to pay the plaintiff's charges, which is certainly much stronger than a mere inference drawn from a previous course of dealing.

GWYNNE, J.—As I understand the evidence, certain logs of Whiteside's having escaped from his pond in a creek, called "Big Creek," he arranged with the plaintiff that he, the plaintiff, should collect and raft them down the stream with other logs which the plaintiff was rafting down, to a point not named, but suitable for shipment, and Whiteside agreed with the plaintiff that for this service he should pay the plaintiff his reasonable charges, in case Whiteside should ship the logs himself, and that in case he should sell them he would do so subject to the plaintiff's charges for rafting them down. It appears to me that under these circumstances the plaintiff, Jackson, upon saving and rafting the logs, would have had a lien thereon against Whiteside for reasonable remuneration, no price having been agreed upon for his work and labour and skill and diligence. But the agreement between Whiteside and Jackson was also that, in the event of Whiteside selling the logs, he would do so only subject to Jackson's charges, or such reasonable remuneration for his services. Accordingly, the evidence shews that, before Jackson had performed the service he had undertaken, and before the logs were conveyed by him to their destination, Whiteside sold to the defendants, upon the express agreement that

the defendants should pay Jackson his charges. Now, under these circumstances, I think there can be no doubt that the defendants could not have recovered in trover against Jackson, if he had refused to deliver up the logs to them, until he should be paid a reasonable remuneration for his services. He would have had a lien on the logs against the defendants. *Norris v. Williams* (1 Cr. & M. 842) is a sufficient authority, if authority be necessary, to support this proposition. Jackson, however, having been informed by Whiteside that he had sold subject to Jackson's charges, and had so secured him, gave up a portion of the logs to the defendants, so much, I presume, as had then come down; and there is evidence that, after doing so, the defendants, recognizing their obligation to pay the plaintiff, promised that they would do so, and I think it may be inferred from the evidence that the residue of the logs were afterwards delivered to them on the strength of this promise. Indeed, the evidence appears to me to be sufficient to establish the plaintiff's right to sue, upon the principle that, when Whiteside, on the sale of the logs to the defendants, made them promise that they would pay the plaintiff's charges, Whiteside had authority so to do upon behalf of the plaintiff in virtue of his agreement with the plaintiff, and the consideration for such promise of the defendants was, the service to be performed by the plaintiff upon the logs which the defendants were buying, and so the consideration for the promise arising from the plaintiff, he is the proper person to bring the action. I see no reason for disturbing the verdict of the jury, and am of opinion that the appeal should be dismissed with costs.

HAGARTY, C. J.—I gather from the admissions on the argument, as it does not appear clearly in the evidence, that a large portion of the work done by plaintiff to these logs was after the sale of them to defendants. If this be the case, the amount may be recoverable as work and labour.

I do not dissent from the conclusion my brothers have arrived at, but I do not feel so certain on the other branch of the case.

Appeal dismissed.

ROSS v. THE CORPORATION OF BRUCE.

Arbitration—Construction of particulars and of reference—Application to revoke.

The particulars in an action on the common counts were headed "Detailed statement of extra work performed by P. R. (plaintiff) on sections 3 and 4, Bruce Gravel Roads, under contract of 1866:"

Held, that this did not necessarily restrict the plaintiff to work done under the sealed contract of that year entered into between the parties, but that he might shew that any work mentioned in the particulars was done outside of such contract, and under a wholly separate and independent one.

Held, also, that under the declaration the plaintiff clearly could not recover for damages of any kind; and the plaintiff's counsel having admitted this, the Court would not revoke the submission on the ground, amongst others, that such a claim was being entertained by the arbitrators.

The reference was expressed to be "subject to such points of law as will properly arise on the pleadings and evidence:" *Held*, that this rendered it imperative on the arbitrators to state for the Court any legal point raised, and to distinguish, if required, the subject for which they awarded in plaintiff's favour, if any legal question was raised applicable thereto.

Robinson, Q.C., obtained a rule calling on the plaintiff to shew cause why the defendants should not be at liberty to revoke the power and authority of the arbitrators appointed in this cause, on the ground that they had received evidence and entertained and gone into matters and claims not within the reference or their jurisdiction thereunder, and were proceeding to determine in the cause matters not referred to them, and on grounds disclosed in affidavits and papers filed.

The declaration was on the common counts for work, and labor, and money.

Pleas were, 1. Never indebted. 2. Payment. Third plea, set out an agreement under seal, 2nd March, 1866, between

the plaintiff and his sureties and the corporation of the United Counties of Huron and Bruce, whereby plaintiff covenanted to do certain work according to certain specifications attached, to the entire satisfaction of the engineer in charge, on certain gravel roads, and to complete the work by a certain time, and to pay to the corporation, as fixed and liquidated damages, for every day that the work remained incomplete after the day named, and that the corporation might deduct the said liquidated damages, at the rate of £5 per day, from any amount to be due under the agreement: that the counties were afterwards separated and the present defendants were entitled to the benefits of the covenants in this agreement, &c.: that the plaintiff did not construct and finish the work in accordance with the specifications and to the satisfaction of the engineer, so as to be completed by the time named, but failed, and for 18 months after date, and thereby became liable to pay to defendants the said £5 per day; and that sum was not deducted from any amount coming to the plaintiff under this agreement, and that the plaintiff owed therefor to defendants \$8,940.

4. Set-off on common counts.

The plaintiff joined issue on the 1st and 2nd pleas, and replied, to so much of the 3rd plea as referred to the £5 per day that by the agreement defendants were bound to procure the right of way on sections 3 and 4, and that the engineer was to lay out and define the work to be done by plaintiff, and defendants were to pay monthly instalments as the work advanced, and that unless the right of way was procured, and the work defined and the estimates paid, the plaintiff was not bound to complete the work by the day mentioned: that the right of way was not procured till after the day fixed for the completion of the work, nor the work laid out and defined, nor payments made in accordance with the agreement—by reason whereof, and without plaintiff's default, he was prevented from completing the work by day named, and did not become liable to pay, &c.

By another replication, on equitable grounds, plaintiff

alleged that the sealed agreement did not contain the whole contract, but that there was a collateral agreement made, that the corporation would procure the right of way for the roads, and the engineer should lay out and define the same to enable the plaintiff to construct the roads according to the agreement, and that the plaintiff should not be bound to complete the work by the time specified unless the right of way was procured and work laid out and defined, and that the sealed agreement was made by the plaintiff on the faith of the collateral agreement; that the right of way was not obtained till after the day fixed for completion of work, nor was the work laid out, &c., whereby, &c.

Issue was taken on this.

The case was entered for trial at London, before Morrison, J., and endorsed on the record was an agreement for a reference, duly signed by the counsel. A verdict was entered for plaintiff, to be increased, reduced, or entered for the defendants by the award of two named referees, who were to appoint a third—(a majority to decide)—“to whom this cause and all matters in difference therein are referred, subject to such points of law as will properly arise on the pleadings and evidence.”

The arbitrators met and took a great deal of evidence.

It appeared from the affidavit of Mr. Shaw, defendants' attorney, that endorsed on the copy of process served there was a statement of plaintiff's claim; the first item was for \$404 as a balance on section of Howick gravel road. Then there were many items for work, and chiefly claims for damages in the removal of men and teams, and stoppage of works and changes of plans and orders by the engineer, and from delay in furnishing plans, and damages from money being kept back, &c., the whole amounting to over \$13,000.

Mr. Shaw swore that he knew of no other claim till the first meeting of the arbitrators, when the record was produced with a bill of particulars annexed, differing widely from the claims in the writ. These particulars were annexed

to the record when the case was referred. It also appeared that by consent a further particular of \$2,786 was attached at the first meeting of arbitrators. A copy of the particulars produced annexed to the record was attached to his affidavit. They were headed "Detailed statements of extra work performed by Paul Ross on sections 3 and 4, Bruce gravel roads, under contract of 1866. Also, statement shewing loss and damage sustained on the said contract by the contradictory orders and unnecessary interference of the engineer with the work, and by his not being prepared with the proper profiles and plans; also the loss sustained by not being paid in accordance with the terms of the contract." Then came a great number of items for work, and then came items for loss on removal of men and teams, and apparently for losses caused by engineer's orders.

That plaintiff at the beginning of the arbitration put in and proved the contract of 1866. On the first day of the third meeting defendants' counsel called attention to a decision of the Queen's Bench just delivered in a case of *Elkins* v. these defendants (30 U. C. R. 48) on a similar contract on these gravel roads, entered into as this was originally with the united counties. There the Court held that the action must be against the united counties and not against the County of Bruce alone, and that the engineer's certificate was indispensable, the action there as here being on the common counts. It seemed that the plaintiff then said he withdrew all claims for work done under the contract of 1866 and extras thereon; and defendants then contended that he had withdrawn his whole case, or nearly all of it, under his particulars.

Mr. Shaw swore that up to the sixth day of the reference he understood from plaintiff's evidence that the great bulk of his claim was for work done under the contract, and for damages for breach thereof by defendants, some few items being mentioned by the plaintiff as not within the contract.

Apparently, after reference to the case of *Elkins*, on the same day, defendants abandoned their set-off of £5 per day, *i. e.*, on the first day of the third meeting.

Defendants' counsel objected that no evidence of loss or damage from nonperformance by defendants of the contract, or delay in the progress of the work, or for extra work caused by the engineer's conduct, could be received on the declaration, though it might have been admissible when given in answer to the plea so withdrawn by defendants, but the arbitrators did not rule in favour of the objections, and evidence of the same character was afterwards received. The plaintiff's counsel then withdrew all claim under the contract, but declined to point out what items were withdrawn.

It was objected that the particulars did not permit his so doing, and the plaintiff obtained an adjournment, and applied in Chambers to amend his particulars, but was refused.

Mr. Shaw also swore that in his evidence the plaintiff claimed to recover the whole of the items mentioned in his particulars, and that the arbitrators received evidence thereof as being outside and independent of the contract, defendants continually objecting that the arbitrators had no jurisdiction, under the reference and particulars, to receive evidence of any claims not for work or extra work under the contract: that evidence of two items, amounting to over \$900, not mentioned in the particulars, was received by the arbitrators, although objected to: that the arbitrators throughout declined to rule upon the objections: that if the reference were to proceed great expense must be incurred by defendants, in procuring professional and other evidence to meet the evidence so admitted by the arbitrators.

Mr. Shaw swore he would never have consented to the reference, except under the belief that the claim was only for work under the contract and extras thereon, and for damages for breach thereof, except as to some items of about \$2000 or \$3000.

Affidavits were also filed of members of the County Council that they always understood that the plaintiff's claim was under his contract, and for damages for breach thereof and extras arising thereon, except for some work on the

Culross road ; and that it was only such claims that they agreed to refer to arbitrators.

Many affidavits were also filed in answer to those filed by the defendants. Plaintiff's attorney denied that he put in or proved the contract, but swore that defendants put it in at the first meeting : that the plaintiff claimed to have done work under several contracts and agreements (not said to be in writing) with defendants both before and after the first named contract : that defendants' counsel expressly stated that he did not object to the plaintiff giving evidence of such matters as did not come under the provisions of the contract first named ; and that it was after several days examination of plaintiff that the defendants stated they would withdraw their plea of set-off, and that it was only in consequence of such plea of set-off of the first named contract being referred to in the record : that next morning the plaintiff gave notice that he made no claim in this contract, and an argument ensued and adjournment took place : that the plaintiff on his examination pointed out about thirty items to be struck out as coming under the first named contract, and there are others still to be struck out before his examination (still pending) was concluded. The plaintiff swore that the major part of the claim sued for was for work done for defendants under verbal instructions from L. B. Hamlin, their engineer in charge of the work : that he, plaintiff, never thought or pretended that said work was done under any written contract which he had with defendants, and it was wholly independent of and outside said contract.

Affidavits were produced by the plaintiff from many of the councillors, to the effect that the plaintiff admitted being paid all due him on the contract, but that he claimed for work done outside of and beyond what the contract called for, for which he had no written order from the engineers, and that they understood all matters were to be referred.

Defendants also filed in reply affidavits from four of the same councillors that they never understood the plaintiff to

claim under any contract independent of or unconnected with the written contract of 1866, but only for extra work and labour thereunder, and for delays caused in getting the right of way.

M. C. Cameron, Q.C., (*Glass* with him,) shewed cause. The plaintiff is not confined by the heading of the particulars to work done under the sealed contract. He may recover for any of the items mentioned in the body of the particulars for which he can prove defendants liable, and which are recoverable under the counts in the declaration. In this case too he is not even restricted to such last-mentioned items, for these particulars were not delivered in compliance with any demand nor under any rule of Court or Judge's order, and they are therefore not binding. The plaintiff may recover for any cause of action admissible under the declaration.

As to the claims for damages, it is admitted that no such claim can be made in this action, the declaration being confined to the common counts for debt. This application to revoke is premature. The arbitrators have decided nothing and expressed no opinion, but have simply received the evidence offered, reserving their judgment. The fear that they will act on improper evidence or award for inadmissible claims is no ground for revocation: *Scott v. VanSandau*, 1 Q. B. 102.

Robinson, Q.C., contra. The plaintiff is confined by his particulars to claims under the contract of 1866. It was the only contract of that year made with the defendants, and the plaintiff put it in as part of his case. The heading could not be more clearly expressed to give it the construction contended for. It was so acted upon by the plaintiff until the judgment in *Ekin's* case shewed that under the contract the plaintiff must fail, and he then sought to claim as outside of this contract the same items which he had before claimed under it. By allowing him to take this course the defendants will be prejudiced: *Mayor v. Ward*, 10 Jur. 796, *per Patteson, J.*; *Northern R.*

W. Co. v. Lister, 27 U. C. R. 60; *Kenrick v. Phillips*, 9 Dowl. 308; *Coker v. Young*, 2 F. & F. 98; *Law v. Thompson*, 15 M. & W. 541; Ch. Arch. Prac., 12th ed., 1458, 1460. The plaintiff clearly could not claim for items not mentioned in the particulars at all: *Morgan v. Harris*, 2 C. & J. 461, and the previous authorities cited. It can make no difference that these particulars were not delivered under a rule of Court or Judge's order, nor demanded, and there is no authority for such contention. The special endorsement on the writ had the effect of particulars, and the plaintiff having substituted these particulars instead, and annexed them to the record as his particulars, they must bind him. This being a reference by consent the particulars could not be amended, and the application for such amendment was properly refused: *Vanderbyl v. McKenna*, L. R. 3 C. P. 252; *Morgan v. Tarte*, 11 Ex. 82. Then as to the main question, the application to revoke, the arbitrators have gone beyond their jurisdiction in three respects. 1. They have received evidence of claims for damages, and such claims, though now abandoned, were expressly persisted in at the arbitration when objected to. *Faviell v. Eastern Counties Railway Co.*, 2 Ex. 344, is in point to shew that the defendants' proper course was then to apply to revoke, and not to wait for the award. See also *Great Western Railway Co. v. Miller*, 12 U. C. R. 654; *Wright and the Corporation of Grey*, 8 U. C. L. J. 104. 2. They have admitted proof of claims for work not done under the sealed contract put in,—and 3. Of two items, exceeding \$900, not in the particulars at all. When such claims were entertained, though objected to, defendants were driven either to meet them by evidence, which would involve useless expense, or to make this application. They could not assume that the arbitrators having admitted such claims in evidence as within their jurisdiction would not award upon them, nor could they rely upon their objections being available against the award. It is true the reference is "subject to such points of law as may properly arise upon the pleadings and evidence;" but the

effect of this as regards the duty of the arbitrators is disputed, and may be subject to doubt. *Hart v. Duke*, 9 Jur. N. S. 119, shews that on an application to revoke the Court may in their discretion remit the case back to the arbitrators with instructions as to the law.

HAGARTY, C.J., delivered the judgment of the Court.

Most of the numerous affidavits filed are perfectly useless, and wholly beside the decision of the motion before us. We do not desire to know what different parties meant or wished to refer, but what has been referred, and that is beyond question.

“The cause and all matters in difference therein,” were referred, and nothing either less or more.

It was very properly admitted by Mr. Cameron, on the argument, that the plaintiff could not on this reference make any claim for damages of any kind. The defendants abandoned their special plea of set-off, and the claim is narrowed down to one for work and labour, with the defences never indebted and payment.

Apart from the question as to the form of the particulars, this action seems to be the common case of a plaintiff who has entered into a special contract to do certain work trying to recover outside of the contract, and endeavouring to made out such a case as will entitle him to sue for the general value of the work.

The defendants' endeavour will be to shew that there was such special agreement, that the work was really done under it, and that both as to work originally contracted for and any variations or extra work required by them or their engineers in charge, as the main work advanced, that the contract and all its provisions as to prices and certificates of the engineer, &c., must govern.

Certainly in a court of justice, as before any honest arbitrator, a plaintiff situated as this plaintiff is would require to make out beyond reasonable dispute that the work for which he sought to recover was done on some wholly separate and independent bargain and contract unconnected

with the original contract, and not as an extra to it, before he should be permitted to escape from its provisions.

The defendants strongly contend that under the particulars annexed to the record no evidence can be received except for work on the contract, or extra work governed by it.

I think the case cannot turn on this objection.

The particulars, as I understand, contain items for all, or nearly all, the work done by the plaintiff on the gravel roads, or at all events that he does not claim before the arbitrators for work not specified in that bill.

I do not think that a judge at *Nisi Prius* would let this objection govern the main contention, which is not whether certain work mentioned in the particulars was done or not done, but whether if done it was done under the contract of 1866, or wholly independent of that contract.

That he so headed his particulars might be used as an argument that the work charged for was really done under the contract.

I cannot see how defendants could be misled or prejudiced in their defence by this view, as on reading the particulars they would at once see that the plaintiff was claiming payment for all this work, and knowing that the declaration was on the common counts they must have at once foreseen the course the plaintiff was taking. It appears they knew he had been paid for all the work done under the contract, and that he was now attempting to recover a large sum in addition, either as extras or as damages for alleged losses from engineer's orders or defaults, &c.

In *Law v. Thompson* (15 M. & W. 545) Alderson, B., says; "If they (the particulars) give substantial information of the plaintiff's claim that is sufficient, although they may vary slightly from the fact, and where from the nature of the particulars themselves the defendant is not likely to be misled. But we cannot look to the actual fact of the misleading: that depends upon the acuteness or stupidity of the defendants' attorney, and is therefore no criterion, unless we apply this rule also, would a reasonable

man be likely to be misled by the form of the particulars?" See also *Lambirth v. Roff* (8 Bing. 411.)

In *Mayor v. Ward* (10 Jur. 796) the particulars were for five per cent. commission as architect. No agreement therefor could be proved and plaintiff was allowed "to put his claim on the alternative of the value of the damages and other matters which as architect he had provided for the work." Patteson, J., remarks that "the five per cent. was not claimed on the footing of any agreement so as to confine the plaintiff to a particular; if that had been so it would not have been open to the plaintiff to go into a case upon the *quantum meruit*. Here the cause of action stated in the declaration is work and labour, and I do not see how the statement in the particulars might not be taken as a mode of estimating the amount." And in giving the judgment of the Court after consideration Lord Denman, says: "although the plaintiff's particulars were for commission, we think they cannot reasonably be considered to bind him to recover that only, and that indeed they could not so bind him, and he ought to be at liberty to shew the value of his services."

This case was approved and acted on in *Northern Railway Company v. Lyster* (27 U.C.R. 60). Draper, C.J., says, "As has often been observed, particulars are not to be construed with the strictness applicable to a count on a special contract, and if the defendant could not be misled as to the preparation he had to make in order to resist the claim, the plaintiffs should not be defeated. It is manifest the defendant was not misled."

Coker v. Young (2 F. & F. 98,) seems to me the strongest in favour of the defendants' view; but the judge at *Nisi Prius*, said that he would amend the particulars in any way to meet the justice of the case; but that would not alter the substance, that the contract must govern. I do not consider the case, as reported, an authority against the view I hold.

I do not think Sir J. Patteson's distinction as to the claim "not being on the footing of any agreement so as to

confine the plaintiff to a particular contract" sufficient to govern this case. Had the plaintiff there said, "I claim five per cent. commission from you under contract made with you at such a date," he might not be perhaps allowed to shew the work he had done, and what would be a proper commission to him therefor; as he had claimed that it was fixed by special bargain. Here the plaintiff says, "this is my detailed statement of the extra work I did for you in sections three and four of your gravel roads contract of 1866."

I repeat, that I think we should be adopting a wholly unwarranted strictness of construction, if we held this bound him strictly against contending that any portion of this work could be considered as done wholly outside that written contract. In one sense, all his work must have been done under, that is in consequence of his contract with defendants, as it was only in consequence thereof that he ever worked at all on these gravel roads or sections.

Mr. Shaw's assumed difficulty strikes me as having arisen chiefly, if not wholly, from his not being aware that the present particulars were attached to the record when the order of reference was made.

As to revoking the submission, this would, no doubt, be a proper course in certain cases.

In *Faviell v. Eastern Counties Railway* (2 Ex. 350), Alderson, B., says, "When the defendants saw the arbitrator entertaining a question which he ought not to entertain, it was their duty to interpose, and apply to a judge for the purpose of being allowed to revoke the submission, which no doubt would have been granted, had it appeared by affidavit that the arbitrator intended to exceed his jurisdiction."

In *Hart v. Duke* (9 Jur. N. S. 119,) a plaintiff had been subpœnaed *duces tecum* to produce his books, but would not do so, and the arbitrator would not make him do so; an application for leave to revoke the submission was made, and Blackburn, J., says, "If a judge sees that mischief will be done by a misruling upon a point of law, he ought to

exercise his discretion by revoking the arbitrator's authority, unless the arbitrator should act according to the directions of the Court. * * I think, therefore, that the arbitrators' authority should be revoked, unless he receives in evidence those entries, of course subject to any legal objection which may be raised against them. Rule to be discharged on plaintiff allowing defendant to open and look at the books, otherwise absolute."

In *Great Western Railway v. Miller* (12 U. C. 659,) Draper, J., refusing leave to revoke, says, "It is not suggested that there is any reason to apprehend partiality or any sort of unfairness on the part of the arbitrators, nor even misconduct in receiving evidence, or rejecting it, or going into matters not submitted to them."

Scott v. Vansandau (1 Q. B. 102,) is much in point, and resembles this case in many features. A case was referred, with the same powers as a judge at Nisi Prius to decide as to the admissibility of evidence and reserve points of law for the decision of the Court. Certain evidence in depositions was tendered by plaintiff and objected to. The arbitrator, pressed to declare whether he would receive them or not, declared that he would receive them, and that whatever objections seemed to him to be important he would raise for the opinion of the Court. Defendant applied for leave to revoke. He urged that their reception would cause great extra expense. A very full judgment of the Court reviews the law on the subject and leave to revoke was refused. It is said, "If the award reserve points the Court will decide them; if it omit any which the defendants think ought to have appeared, the defendant will undoubtedly be free to avail himself of the stipulation in the order of reference, and to call upon the Court to set aside the award in consequence. * * The discretion of the Court to which this appeal is made ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of strife, should only open the floodgates for multiplied expenses and interminable delays." The

judgment is well worthy of a careful perusal on many of the points raised in this case.

These cases shew, I think, with reasonable clearness the present state of the law on these points.

The defendants in making this application expressly disclaim all imputation on the fairness or impartiality of the arbitrators. It is expressly shewn that they have not decided anything one way or the other on any of the objections urged, but have received evidence, reserving their ultimate decision thereon.

We cannot but see that much of the evidence as to the plaintiff's losses under the contract may have been given and received to meet the defendants' claim for the £5 penalty per day, which claim was not withdrawn till after several days' evidence had been taken.

I am not prepared to say that a case is made out for revoking the submission. I think we cannot withdraw the case from the tribunal chosen by the parties unless we can see clearly that that tribunal is taking an illegal course, or assuming to adjudicate on matters not within its jurisdiction.

The plaintiff's counsel pointedly disclaims any right to recover on this record for losses or damage for alleged breaches of the contract. After this disclaimer there can be little fear that any body of arbitrators with any sense of fair dealing will entertain such a claim.

It is not for us to say beforehand what evidence may be adduced, or to pronounce any opinion on that already given, to establish the plaintiff's very difficult position that he has done work for defendants on these gravel roads, or by verbal orders from their engineer. which may not be governed by the terms of the written contract of 1866.

In any shape the case might assume, it would be eminently one unfit for a trial by jury, and certain to be referred.

In the submission there is the very proper provision, though it might have been more carefully expressed, that the reference should be "subject to such points of law as will properly arise on the pleadings and evidence."

This provision we think renders it imperative on the arbitrators to state for the information and guidance of this Court any legal point raised on either side, and for this purpose, if required, to distinguish in their award, if they find for the plaintiff, the subject on which they award money to him, if a legal question be raised by defendants applicable thereto, or affecting his legal right to recover therefor.

The facts are left to their decision. All legal points governing or affecting the right to recover on these facts are for the Court.

Any refusal to report or note legal points so raised, or any attempt to prevent the Court from seeing on the face of the award the bearing or applicability of any such legal objections to any sum or sums awarded, would no doubt seriously endanger the validity of the award.

I do not feel warranted in anticipating that respectable arbitrators, against whom no imputation is made, will commit any intentional injustice, or improperly permit the plaintiff to escape from the provisions of any contract deliberately entered into by him, or improperly deprive the defendants of any protection which such contract or the law of the land accords to them.

I think the rule should be discharged, but under all the circumstances without costs.

GWYNNE, J.—I concur in the judgment, and have only to add, that if the arbitrators should receive and act upon evidence of any items not mentioned in the particulars, the plaintiff cannot, upon this reference, recover in respect thereof.

GALT, J., concurred.

Rule discharged without costs.

HORTOP V. TAYLOR.

Demise of mill—Covenant equitably to adjust rent up to time of destruction—Construction—Variance.

In an action on a demise by deed of a mill and premises, the declaration, after setting out the demise from 15th December, 1868, to 30th December, 1877, at a rental of \$1,100, payable half yearly in advance, on 15th December and 15th June, proceeded to state that in case the mill should be totally destroyed through accidental fire, &c., the term created should at once cease, and the rent should be adjusted at what, on a just apportionment, should be found to be the due proportional part thereof up to that time, and should be apportioned between the parties accordingly: *Averment*, of due payment until destruction by fire of all rent up to that time due, including the half-yearly payment due and payable in advance for the half-year commencing on 15th June, 1869, and that during continuance of demise and currency of said half-year of said term commencing on said 15th June, said mill was, on 30th October, 1869, totally destroyed by accidental fire, whereupon said term immediately ceased, and plaintiff became entitled to have said rent adjusted and apportioned as aforesaid, and defendant became liable to refund and repay to plaintiff so much of said rent so paid in advance by plaintiff as, on a just apportionment thereof, should be found to be in excess of said rent beyond the due proportional part thereof down to said 30th October; and that on this day the sum of \$137.50 was the sum which, upon a just apportionment of the rent reserved, would be and was the amount of said rent so paid in advance by plaintiff over and above a due proportional part of said rent down to said 30th October, and all conditions, &c., yet defendant had not paid the same. The words of the lease produced at the trial were, “and in case of the total destruction thereof, &c., &c., the term hereby created, &c., and the proportion of rent up to that time shall be adjusted equitably between the parties:”

Held, reversing the judgment of the County Court, that there was no such variance between the legal effect of the instrument declared on and that produced in evidence as entitled defendants to nonsuit the plaintiff.

Held, also, that no averment of an actual surrender of the demised premises, as a condition precedent to the cause of action accruing, was necessary.

APPEAL from the County Court of the County of Wellington.

The declaration stated that defendant, by deed, demised to plaintiff a mill, &c., from 15th December, 1868, to 30th December, 1877, at a rent of \$1,100, payable half yearly in advance, on the 15th days of December and June, and thereby agreed with plaintiff that in case the mill became untenable, through accidental fire, or other fire, the act of any person other than the culpable act of plaintiff, &c.,

a reduction or abatement of rent proportionate to the injury done, and for the time the same should remain unrestored, should be made, and that in case of the total destruction thereof through or by any of the said means, and not through the culpable act or neglect of the lessee personally, *the term thereby created should at once cease and be at an end*, and that the rent should be adjusted at what, on a just apportionment, should be found to be the due proportional part thereof up to that time, and should be apportioned between the parties thereto accordingly.

Averment, that from the commencement of said demise until the destruction of said mill by fire, as hereinafter mentioned, plaintiff duly paid all the rent by said deed reserved which, up to the time of such destruction, had become due and payable, including the half-yearly payment thereof which became due and payable in advance for the half-year commencing on the 15th day of June, 1869, according to the terms of said deed, and performed the covenants therein contained by him to be performed; and that, after the making of said deed, and during the continuance of said demise, and whilst plaintiff was possessed of said demised premises, and during the currency of said half-year of said term, which commenced on said 15th June in the year last aforesaid, and for which said rent was so paid in advance as aforesaid, to wit, on the 30th October, 1869, said mill was totally destroyed by accidental fire, and not through the culpable act or neglect of the plaintiff personally, *whereupon the said term immediately ceased and became at an end, and plaintiff became entitled to have the said rent adjusted and apportioned as aforesaid, and the defendant became liable to refund and repay to the plaintiff so much of said rent so paid in advance by plaintiff as aforesaid as on a just apportionment thereof should be found to be the excess of said rent beyond the due proportional part thereof down to said 30th October, 1869; and that on said last-mentioned day, when said total destruction by fire happened, and said*

term ceased, the sum of \$137.50 was the sum which, upon a just apportionment of the rent reserved by said deed, would be and was the amount of said rent so paid in advance by plaintiff over and above a due proportional part of said rent down to said 30th October, 1869; and all conditions, &c., &c.; yet defendant had not paid the same. There were also the common counts for money paid, received, lent, account stated, and interest.

Pleas, 1. *Non est factum*; 2. Never indebted.

Issue.

The cause was tried by the County Judge, without a jury.

The lease declared on was produced. After providing for an abatement of the rent and a cesser of the term, as set out in the declaration, it proceeded, "and the proportion of rent up to that time" (the total destruction of the premises) "shall be adjusted equitably between the parties."

At the close of the plaintiff's case it was objected, on the part of the defendant, 1. That the money (rent) having been paid in advance could not be recovered back, as there was no promise to repay; 2. That there was no basis of apportionment: that time was not the rule on which to make the apportionment, and that there was no basis on which to fix the amount as an equitable adjustment; 3. There was an agreement to refer, &c., and plaintiff said it had been submitted, but there was no award.

A verdict was entered for plaintiff for \$137.50.

In the following term a rule *nisi* was obtained to enter a nonsuit or verdict for defendant, pursuant to leave reserved, or for a new trial, on the law and evidence, and that the money paid by plaintiff to the superior landlord was not money paid to the use of or for defendant, and could not be recovered under any of the counts of the declaration; that by plaintiff holding the premises after the fire, he elected to continue the term, and did not put an end to it, as he might; that there was no covenant or

provision in the lease to repay any money paid as rent, but only to equitably adjust the same, for which provision was made by means of a reference under the lease, and no right of action arose by reason of the plaintiff's payment of rent to the superior landlord, and the only means of settling whether it was properly paid or not was by reference to arbitration, and it was not necessary to plead this, the plea denying the agreement setting up the right to recover being sufficient, and that arbitrators had been duly named by plaintiff and defendant under the provisions of said lease, and no award made thereon, as provided thereby to be done; that plaintiff's action being in debt, as he contended, no debt arose between the parties until plaintiff had given up possession to defendant, and no equitable adjustment of the proportion of rent to be repaid by defendant to plaintiff had been made, and that until such equitable adjustment had been made, taking into consideration the continued occupation of the plaintiff, no action of debt was maintainable.

After argument the rule was made absolute to enter a nonsuit, and the plaintiff appealed.

Palmer, for the appellant, cited *Boodle v. Campbell*, 7 M. & G. 387; *Hare et ux. v. Proudfoot*, 6 O. S. 617.

M. C. Cameron, contra, cited *North v. Wakefield*. 13 Q. B. 536; *Henderson v. Squire*, L. R. 4 Q. B. 170.

GWYNNE, J.—The whole question, as it appears to me, which is presented upon this appeal is, whether the contention of the defendant at the trial was correct, that there was such a variance between the legal effect of the instrument as set out in the declaration and that produced in evidence as to entitle the defendant to nonsuit the plaintiff. The learned Judge at the trial offered to receive, but the defendant's counsel declined to give, any evidence for the purpose of determining how or at what sum the proportion of rent up to the time of the fire should be adjusted equitably between the parties. The learned Judge, before whom the case was tried without a jury,

upon the only evidence which he had, rendered a verdict for plaintiff, apportioning the rent by the time which had elapsed since the commencement of the half-year current when the fire took place, and he found \$137.50 to be the sum to be repaid by the defendant to the plaintiff, reserving leave to the defendant to move to enter a nonsuit, and upon that rule being moved, he afterwards made it absolute.

I confess I cannot see the force of the defendant's objection, nor can I see that the declaration does not set forth the fair legal effect of the covenant in the lease; for "the proportion of the rent up to the time of the fire will be adjusted equitably between the parties," which are the words in the lease, when, and, as it appears to me, only when, "the due proportionate part thereof up to the time of the fire should be ascertained, and when the rent already paid in advance shall be apportioned between the parties accordingly (which are the words in the declaration) by the defendant refunding to the plaintiff whatever he had already received in excess of such the proportionate part, to do which there is, in my judgment, a covenant by implication. It is immaterial, in the view which I take, whether there be few or, as was contended by the defendant, many things to be considered before the *due* proportionate part of the rent to be retained by the defendant should be ascertained, for upon this declaration it was, in my opinion, quite competent for the defendant to have presented all such matters as in his opinion should be taken into consideration for the purpose of the equitable adjustment. The result to be arrived at was, what proportion, if any, of the rent already paid should be refunded by reason of the total destruction of the mill. I can see no difficulty in a jury, or, if the parties should prefer it, in a Judge, without a jury, arriving at a conclusion which should be *ex æquo et bono* decisive of this point. The learned Judge seems to have been of opinion that the declaration should have averred simply a demand upon the defendant equitably to adjust, and his refusal;

but a covenant that "the rent shall be equitably adjusted between the parties," is, I take it, in substance and effect a covenant that the defendant will repay to the plaintiff so much of the rent already paid in advance as, upon an equitable adjustment, that is, as *ex æquo et bono*, it shall be determined he should repay, and for breach of such a covenant the declaration appears to me to be well framed. The learned Judge seems also to have been of opinion that the plaintiff should have averred and shewn that he had "taken advantage of the condition" for the cesser of the term, "and that he had surrendered the premises." I see nothing in the evidence to lead to the conclusion that the plaintiff ever has retained, or has claimed any right to retain, possession of the site of the burned mill as against the defendant; but his right to have an equitable adjustment of the rent is not by the covenant made conditional upon his performing any *act* of surrender of the premises as a condition precedent to his right of action accruing. And if such act had been necessary, it seems to be sufficiently averred in the averment of performance of all conditions, &c., entitling plaintiff to sue; and if the plaintiff has in fact kept the defendant out of possession, and if his so doing is a bar to plaintiff's action, the matter should have been pleaded in bar; and if the not giving up the premises presented no bar to the action, but should affect the amount of the proportion of the rent, if any, to be repaid, the defendant should have given evidence of the fact, and claimed such benefit from it as its weight entitled him to. But it appears to me that the covenant for apportionment of the rent would remain even if the term were not determined, as it is, by the express terms of the lease, in the event which has happened. The learned Judge seems also to have been of opinion that the adjustment should have been made by arbitration, but the covenant is not that the defendant will repay such sum as arbitrators, or any particular person, shall award or adjust. I see no ground for holding that a cause of action has not arisen, nor that it is not well stated in the declaration.

The defendant, at the trial, purposely abstained from offering any evidence to govern the mind of the Judge in adjudicating upon the amount, if any, to be repaid to the plaintiff: he has chosen to rest upon his legal objections. Under the circumstances, I do not think that we can properly make any other order than that the appeal shall be allowed, and that the rule for a nonsuit in the Court below shall be discharged, and that the plaintiff's verdict do stand.

HAGARTY, C. J.—I agree in the result arrived at by my brother Gwynne. I cannot help noticing that the clause relied on by plaintiff is, that in case of a destruction by fire it is provided that "the proportion of rent *up* to that time," viz., the time of the destruction, "shall be equitably adjusted between the parties." It seems to me that it was the proportion of rent *after* that time, and not *up* to that time, that was to be adjusted: the rent up to that time was earned. But as no such objection was raised, I assume both parties place the same construction on the words.

GALT, J., concurred.

Appeal allowed.

PRINCE ET AL. V. LEWIS.

Purchase of goods—Principal and agent—Special authority—Ratification.

Defendant, on 2nd July, addressed a letter to his agent in these words: "You better see what you can secure 1,000 barrels more of the best oil at, or, if there be a tank that you come across with from 2,000 to 5,000 genuine oil, I would buy it, and pay, say, \$1,000, \$2,000, or \$3,000 down, or, if need be, the whole. I don't think oil can be much higher, but I don't look for it to be cheaper; therefore would not think it bad policy to secure enough to keep me running through the winter. Please post me what you can: "

Held, that no special authority was conferred by this letter to purchase 3,000 barrels from plaintiffs.

Defendant's agent having, on 2nd or 3rd July, telegraphed him that he had bought 3,000 barrels from plaintiffs, defendant, on the same day, replied that he did not want \$3,000 barrels, and also wrote that he was almost afraid he could not "tackle" the oil just then; that he (agent) no doubt thought he was buying cheaply or he would have advised with him before closing, but that as some time had elapsed since he had communicated with him on the subject, it would have only been proper to have done so before closing the transaction, and that, meantime, he preferred not having it; requesting him at the same time to write him all about the market products, and he would in return write him his matured opinion. It further appeared that defendant was wholly ignorant of the terms of the contract, with the exception of price and quantity, but as soon as made aware of them he told the latter to go back and see plaintiff and try to get out of the contract, which, according to agent's own evidence, he, defendant, had already repudiated; and defendant explained this interview thus, that he told the agent he would not take the oil, and that he had better see if he could not himself get out of it, and that he would go and see plaintiff. On 28th July defendant wrote plaintiffs, repudiating the contract and the agent's authority in making it:

Held, no ratification of the contract.

THIS was an action, tried before Wilson, J., at the last assizes at London, for not accepting a quantity of oil, the defence being that the person making the purchase was not the agent of the defendant, or authorized by him to effect it. At the conclusion of the plaintiff's case, a non-suit was moved for on this ground, but the learned Judge overruled the objection, reserving leave to defendant to move upon it.

At the close of the plaintiff's case the learned Judge, before whom the case was tried without a jury, ruled that no case of general agency had been made out. He, however, held that the letter written by defendant on the 2nd July,

hereinafter set out, amounted to a special authority, and that another letter, of 21st July, was not a disclaimer of the purchase, or of the agent's exercise of power, but was rather a ratification of it, though not approving of it; and further, that a conversation with the agent, on the 25th July, was capable of being construed also as an admission that he was bound by the agent's act, but that he wanted to get out of it. He therefore declined to nonsuit, and reserved leave to defendant to move to enter a nonsuit or verdict, as the Court might determine.

C. Robinson, Q.C., obtained a rule *nisi* accordingly, to which *Anderson* shewed cause, citing *Smith v. McGuire*, 3 H. & N. 560, *Story* on Agency sec. 235, and contending that there was evidence to establish a general agency, and, if not, that a letter written by the defendant to the person who professed to act as agent was sufficient to authorize him to bind the defendant; and lastly, that there was a ratification by the defendant.

Robinson, Q. C., contra, referred to *Mawson v. Blane*, 10 Ex. 209; *Prince v. Clark*, 2 D. & R. 266, S. C. 1 B. & C. 186; *Fitzmaurice v. Bayley*, 6 E. & B. 874; *Story* on Agency, sec. 243; *Horsfall v. Fauntelroy*, 10 B & C. 755; *Marcus v. Smith*, 17 C. P. 425; *Attwood v. Munnings*, 7 B. & C. 278.

GALT, J.—The ruling of the learned Judge on the question of general agency was, in our opinion, entirely borne out both on the evidence and on the principles respecting general agency, as laid down by Lord Cranworth in *Poole v. Leask* (8 L. T. Reports, N. S., page 645), and adopted by our own Court of Queen's Bench in *Myles v. Thompson* (23 U. C. 553). The letter of 2nd July is as follows:

“GUELPH, July 2, 1870.

“WILLIAM SMITH, ESQ.

“*My dear Sir*:—I have now sent tanks to you for to commence the 1,000 barrels tanked (underground) oil you bought for me.” (This has reference to another quantity

of oil not in question). "I trust it will prove good, and, like a good fellow, see that tanks are always in good order, and well filled." (This, we understand, has reference to the tanks on cars, which defendant used for the carriage of his oil from Petrolia to Guelph). "You better see what you can secure 1,000 barrels more of the best oil at, or, if there be a tank that you come across with from 2,000 to 5,000 genuine oil, I would buy it, and pay, say, \$1,000 \$2,000, or \$3,000 down on it, or, if need be, the whole. I don't think oil can be much higher, but I don't look for it to be cheaper, therefore would not think it bad policy to secure enough to keep me running through the winter. Please post me what you can."

It appears to me, from the expression, "you better see what you can secure 1,000 barrels more of the best oil at," that it was not the intention of the writer to confer an authority on Smith to purchase 1,000 barrels, but rather a request that he would make enquiry as to the price for which he could purchase them. If this reading is correct it tends very strongly to support Mr. Robinson's argument, for it is unreasonable to suppose that a person who would not confer an authority to purchase 1,000 would at the same time authorize the purchase of 3,000 barrels. The concluding paragraph, "Please post me what you can," seems to point strongly in the same direction. It is argued that this latter expression is susceptible of various meanings, but if so, then it is obligatory on the plaintiff to satisfy us that the meaning put upon it by him is the true one, and if he does not do so, he must fail: see *Boden v. French* (10 C. B. 886); *Cross et al. v. Eglin et al.* (2 B. & Ad. 106). It appears to me that, taken in connection with the preceding request that Smith would see what he could secure 1,000 barrels at, the fair and reasonable construction to be put upon the expression, "please post me what you can," is, that Smith should, before completing any bargain whatever, advise with the defendant. Supposing even that another interpretation can be put upon it, yet the plaintiff is not entitled to avail himself of the ambiguity,

for he states in his evidence at the trial that he never saw the letter until after defendant had repudiated the contract; that he never even asked to see it; therefore, in dealing with Smith, he acted as if the agent had a general authority, which it is very plain he did not possess. It is important, as bearing on the interpretation to be put upon this certainly somewhat obscure phrase, to see what defendant's conduct was at the time he was informed of the transaction. Smith, in his evidence, states: "I telegraphed defendant on 20th July I had bought 3,000 barrels at \$2." Defendant, in his evidence, says: "Smith telegraphed on 21st July he bought 3,000 barrels at \$2. I answered I did not want 3,000 barrels." There is a discrepancy here of a day, and as we are not in possession of a copy of that telegram we cannot be perfectly sure who is right; but we have a copy of the defendant's message, which is, "Don't want 3,000 barrels; write you to-day." I therefore incline to think that, whether the first message was sent on 20th or 21st, that it was not received until the 21st. On the same day, defendant writes to Smith: "I am almost afraid to tackle 3,000 barrels of oil just now at \$2, in face of the present situation. You no doubt thought you were buying cheap or you would have advised with me before closing, but I think, as some time has passed since my last communication on this subject to you, that it would have only been proper to have communicated with me before closing a \$6,000 transaction. In the meantime I would rather not have it. *Please write me all about the market products, and I will, on receipt, write to you my matured opinion.* We have not been running now for nearly a month, and I am afraid that our place won't be ready for some time yet. I am very much disappointed at the progress of improvements at my refinery. I shall wait your letter with interest."

It will be necessary to consider this letter attentively in the other branch of this case, but I insert it here for the purpose of shewing that the defendant was under the

impression that his letter of 2nd July did not authorize Smith to *conclude* any bargain, but merely requested him to inform the defendant what he could do. Upon the whole, I am of opinion that the letter of 2nd July was not an authority, and that, in consequence, the plaintiffs' case fails both as respects general agency and special authority.

The question then remains, did or did not the defendant ratify the contract? There can be no doubt that the telegram of 21st July was not a ratification: it would, I think, be impossible to construe the message as an acceptance. He says expressly, "Don't want 3,000 barrels oil; write you to-day." This message is of great importance in arriving at a decision on the question of ratification. It is well established that "where the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agent, he will be bound thereby as fully to all intents and purposes as if he had originally given him direct authority in the premises to the extent which such acts, doings, or omissions reach. The maxim of the common law is, '*omnis ratihabitio retrotrahitur et mandato priori æquiparatur*:'" *Story on Agency* (sec. 239). It is to be observed that it is only upon a full knowledge of all the circumstances of the case that the principal can be held bound, and therefore it was contended by Mr. Robinson, in this case, that the letter of the 21st July cannot be considered as a ratification of the sale of 20th July, because the terms of that sale were not known to defendant when the letter was written. I am hardly prepared to adopt this view, because the defendant knew the quantity and the price, and if he had been prepared to receive and pay for the oil, he might have ratified the purchase; moreover, as observed by the learned Judge at the trial, the contract was not repudiated except for the total want of authority on the part of the agent, not on the ground of any deviation from his instructions. The telegram in which the defendant refuses to carry out the contract is

express on this point. It is dated 28th July, 1870, and addressed to plaintiffs: "I will not carry out contracts that William Smith assumed to make with you and with Irwin & Smith for me, dated 20th instant; he had no authority to make such contracts." It must be conceded that, in order to ratify a contract, it is absolutely necessary that the intention of the principal to adopt the contract of the agent should be manifested either by direct assent or by conduct which would justify a jury in concluding that he had assented. It is evident that the defendant, by his telegram to Smith, of 21st July, did not give any assent, but it is urged that his letter to that gentleman, of the same date, "was not a disclaimer of the purchase, but rather a ratification of it, though not approving of it." The expression, however, in the letter, "I would rather not have it. Please write me all about the market products, and I will, on receipt, write to you my matured opinion," cannot, in my opinion, be held to mean anything more than that defendant was desirous of ascertaining the state of the oil market before making up his mind, and, taken in connection with the telegram of the same day, cannot fairly be construed as a ratification. If this letter was a ratification, it necessarily followed that the bargain was binding upon both parties. Suppose, then, that instead of treating the letter as a ratification, the agent had looked upon it as a disclaimer, and had notified the plaintiff to that effect, who, in consequence, had sold the oil to a third party; could the defendant have successfully contended that he had a right of action against the plaintiff for non-delivery of the oil, in the face of his own declaration that he did not want the oil, and a request for further information before forming his mature opinion. I think not, and consequently, as the rights of parties must in a case of this kind be reciprocal, the plaintiff has no right of action based upon a ratification, as evidenced by the letter. It is well established that a principal can be held to have ratified the act of a person, acting as agent, by his conduct as well as by a distinct assent; if, for

instance, he receives the goods, or any portion of them; if he sells the goods; or if, after having been informed of the purchase, he does not within a reasonable time express his dissent. The two former of these propositions do not enter into the present discussion, and therefore it is unnecessary to quote authorities to establish them. This case must turn on the view we take of the third. The case of *Prince v. Clark* (1 B. & C. 186), cited by Mr. Robinson, shews that, if a principal disapproves of the act of the agent he must do so within a reasonable time. The delay in that case extended from 29th May to 7th August. Bayley, J., in giving his opinion, says: "The purchase not being authorized by the principal, it was competent to the latter either to adopt or repudiate the act of the agent. The principal, however, has no right to pause, and to wait the fluctuation of the market in order to ascertain whether the purchase is likely to be prejudicial or beneficial; he is bound, if he dissents, to notify his determination within a reasonable time, provided he has opportunity of doing so." Let us apply the above doctrine to the present case. The transaction took place on the 20th July, and was notified to defendant on that day, or on the 21st. No mention was made of the names of the vendors, so there was no person to whom the defendant could communicate his dissent except to the agent, and he did at once notify him, saying, "Don't want 3,000 barrels of oil," and wrote to him the same day to the same effect. According to the evidence of the agent there was no further correspondence, but defendant telegraphed him to meet him at London on 25th July. They did meet on that day, and what took place is thus stated in their evidence given at the trial. Smith says: "I did meet him at 'Tecumseh House' on evening of 25th July. He told me to go back and see plaintiff, and try to get out of the contract." This is the evidence referred to by the learned Judge when he declined to nonsuit at the trial. It must be recollected that the opinion expressed was before defendant's explanation had been given. He says: "I told Smith I would

not take the oil; that he had better see if he could not get out of the thing himself with plaintiff. I said to Smith I would go and see plaintiff. He said he would do what he could to fetch it all right. I thought he did not want me to go and see plaintiff. I never verbally accepted the contract." It is to be observed that in his evidence Smith does not in any manner assert that defendant accepted the contract at this interview, nor that defendant admitted his authority to make it. This appears to me to be very important in arriving at a just decision. A letter written by him to defendant, dated 30th July, after the defendant had expressly repudiated the contract, has a very strong bearing on the question of the authority which he thought he possessed. He writes: "Your favour received repudiating purchase of crude from Prince (3,000 barrels). You say I did not telegraph you on 26th, according to promise. I did telegraph you at 'Tecumseh House' from Petrolia, before one o'clock. Perhaps you had left before it arrived, but I did telegraph according to promise. You say you did not give me any authority to buy crude. Now I have your letter saying, 'buy me 1,000, 2,000, or 3,000 barrels of crude, and I will pay \$1,000, \$2,000, \$3,000, or the whole if required.'" There is no suggestion here of any *ratification*. The whole is based upon the letter of 2nd July, which in my opinion does not contain any such authority as Smith thought it did. I am of opinion that there was no ratification by subsequent conduct, and therefore this point must also be decided against the plaintiff, and the rule to enter a verdict for the defendant should be made absolute.

GWYNNE, J.—This case may be considered before us in two ways; 1st. In virtue of the Ontario Statute 33 Vic. ch. 37, sec. 6, which enacts that "whenever the verdict or finding of the Judge (before whom a case is tried without a jury, as this was) is moved against under sub-section 2 of section 18 of the Law Reform Act of 1868, the Court may pronounce the verdict which in their judgment the

Judge, who tried the cause, ought to have pronounced, and amend the *postea* and enter a verdict accordingly, subject nevertheless to appeal," &c. ; or 2nd, in virtue of the reservation by the learned Judge, with the consent of the parties at the trial, of leave to move to enter a nonsuit or a verdict, as the Court, to whom the whole matter is referred open upon the evidence, shall determine ; but under whatever authority the case is before us we are required to discharge the functions of a jury, and to draw such inferences of fact as they should if the case had been before a jury, as well as to determine the points of law which have been raised. The rule, which has been argued, is a rule to enter a verdict for the defendant, or a nonsuit, pursuant to leave reserved at the trial, on the ground that the contract upon which the action is brought was not shewn to have been made, authorized, or ratified by defendant. The case turns upon the questions, 1st, Whether or not Mr. Smith who signed the contract with the plaintiff, assuming to bind the defendant, had *special* authority from the defendant to enter into that contract as defendant's agent, for all idea of a general agency to bind defendant is, I think, negatived by the evidence ; and 2nd, If Mr. Smith had no such special authority, was or not the contract which he did make, assuming to bind the defendant, afterwards ratified by the defendant ?

The authority, if any, which Smith had is contained in the letter from the defendant to him of the 2nd July, 1870. By slightly inverting the order of the sentences in that letter, having regard also to certain surrounding circumstances which appear in evidence, and which are to be taken into account to assist in the construction of the instrument (*Wood v. Priestner*, L. Rep. 2 Ex. 67 ; *Carr v. Montiforo*, 5 B. & S. 408), I think we can pretty clearly arrive at the correct construction of it. At the time that the letter was written the defendant's refinery was idle, the defendant being then engaged in making improvements therein, which work occupied until the 1st of October. The defendant's space for storage was, as he says, well occu-

pied at the time. In this state of things he writes the letter, the first sentence of which relates to 1000 bbls., which he had just bought, and then proceeds, (altering, as I have suggested, the position of the sentences) thus: "I don't think oil can be much higher, but I don't look for it to be much cheaper, therefore would not think it bad policy to *secure enough to keep me running through the winter*. You better see and post me what you can secure 1000 bbls. more of the best oil at; *or*, if there be a tank that you come across with from 2000 to 5000, I would buy *it*, and pay \$1000, \$2000, or \$3000 *down on it*, *or*, if need be, the whole."

We may fairly assume that the defendant, when writing, had present to his mind his means of storage. We then can see that he did not stand in need of any oil delivered at his refinery for any present or immediate purpose, but that what he did want was to secure a sufficient supply to keep him running through the winter. We can then understand that it may have been an object of the greatest importance to defendant to *secure an underground tank* from which he could draw at his convenience when he should be in a position to remove it to his refinery. Accordingly the letter does not direct the agent to buy or to secure 1000 bbls. of the oil, *and also* to buy or secure a tank containing from 2000 to 5000 bbls., but to "*see what he can secure 1000 bbls. more of the best oil at; or*, in lieu thereof, as if it was passing in the writer's mind, "*what would suit me much better*;" if you come across a tank containing from 2000 to 5000 bbls., I would buy *it*, *i.e.*, the *tank*, and pay, say \$1000, \$2000, or \$3000 *down on it*, *or if need be* the whole. It is only with reference to securing a tank, *i.e.*, as I understand it, an underground tank that he says he would pay anything. In purchasing a *tank* he seems to have been under the impression that *it* might be *secured* by a payment down of a considerable portion, leaving the balance to be determined on being drawn, but *if need be*, (a matter which would seem to depend upon negotiation of which he would be informed and to which

he would be a party) to *secure* a tank, he would pay the whole. In my opinion, then, the true construction to be put upon the letter is, that it authorized Mr. Smith merely to see what 1000 bbls. more of the best oil could be secured at, or what a tank containing from 2000 to 5000 bbls. could be secured for, and to communicate the result of his enquiries to the defendant, so as to enable him to elect into which purchase, if into either, he should enter. Moreover, I am of opinion that if the letter contained complete authority to buy anything without further communication with the defendant, that authority was limited to his purchasing an underground tank, and in neither view had Smith authority to bind the defendant by the contract sued upon. The learned Judge, who tried the cause, was of opinion that this latter point, although taken, was not available to the defendant, for the reason that, as he was of opinion, the contract was not disputed upon such ground; but in my judgment the objection is but an argument in support and illustration of the objection, that Smith had no authority to bind the defendant as he has assumed to do—that defendant did not make the contract sued upon. It is, as it appears to me, an objection which, upon the authority of *Fitzmaurice v. Bayley*, in the Exchequer Chamber (4 Jur. N. S. 506), might be urged in appeal, although not pressed in the Court below, and is undoubtedly available to the defendant when taken at the trial and insisted upon before us.

The second point, whether the contract, although unauthorized when made, has been ratified by the defendant, raises two questions, one of law and one of fact; namely, was there any evidence of such ratification proper to have been submitted to a jury? and if there was, then what conclusion do we, as jurors, draw from that evidence? The only difference in the result would seem to be that if there was evidence which upon the question of ratification or no ratification would be proper to submit to a jury, the plaintiff should not be nonsuited, but we should as jurors weigh that evidence and render our verdict thereupon in favor of

the plaintiff or the defendant, according as we are of opinion that the facts establish ratification or the contrary.

Now, the burthen of proof of ratification lies upon the plaintiff, and that being so, there must be something more than mere probability, or even strong probability; there must either be direct and positive evidence of the fact, or circumstances from which the fact of ratification follows as a necessary and legitimate inference. In *Fitzgerald v. Dressler* (7 C. B. N. S. 397) Crowder, J., says: "To establish a case of authority by ratification there must be substantive proof; it must not rest upon probability or conjecture." Now the telegram from the defendant to Smith of July 21st, "Don't want 3,000 barrels of oil; write you to-day," certainly contains no ratification, nor, as it appears to me, does the letter of that date addressed by the defendant to Mr. Smith. That letter, to my mind, is one of remonstrance with Smith for his having bought without first communicating with the defendant, the excuse for which, the latter suggests, is, that Smith thought he was buying cheap, and so was serving the defendant; but for the present he declines taking advantage of the offer, which he seems to consider it, and before giving his conclusive answer as to what he will do, he asks what sort of oil it is, and desires to be informed all about the market. But that the letter cannot be treated as a ratification is apparent from this, that the defendant was then wholly ignorant of the terms of the contract;—when the oil was to be drawn, and when paid for—whether or not it was in an underground tank—whether the whole tank was what was purchased, or only a part of its contents; of everything, in fact, except that the price was \$2, and the quantity 3,000 barrels. On the 23rd July the defendant, for the first time, becomes informed of the terms of the contract. He then telegraphs to the defendant to meet him at the "Tecumseh House" in London on the 25th. They met accordingly on that day, and whether or not a ratification took place upon that occasion depends upon the oral testimony of Smith himself and the defendant.

Smith says the defendant told him to "go back and see the plaintiff, and try to get out of the contract." Now, if what Smith meant by this was, that he was to go back and see plaintiff, and try and get defendant out of the contract, I cannot say that this might not be evidence to submit to a jury. Yet Smith, in this same evidence, speaks of defendant having already, on the 21st, repudiated the contract. The defendant explains what took place at this interview thus: "I told Smith that I would not take the oil; that he had better see if he could not get out of the thing himself with the plaintiff. I said to Smith that I would go and see plaintiff. He said he would do what he could to fetch it all right, and I thought he did not want me to go and see plaintiff." Now this seems quite consistent with the defendant's insisting that he had not authorized the contract, for in such case Smith would be himself personally liable to the plaintiff. He had an interest, therefore, in getting the plaintiff to release him. The defendant, on the 28th July, not having received a telegram from Smith on the 26th, as he had expected, writes to the plaintiff, repudiating the contract, and explaining the whole difficulty according to the defendant's view, insisting that Smith had no authority to make the contract. Now, that Smith himself did not mean to assert that anything took place between the defendant and him amounting to a ratification of the contract appears from this, that neither Smith nor the plaintiff ever insisted there had at any time been a ratification of the contract. Their whole contention always was, that defendant had wrongfully repudiated a contract which, as they contended, the letter of the 2nd July abundantly authorized Smith to enter into, which letter the plaintiff had never seen or heard of before the contract was signed, although, as he admits in his own evidence, he untruly said in his letter of the 30th July he had seen it, and had made the contract on the strength of it, for, as he says, *a purpose*, which no doubt was *the purpose*, of endeavouring thereby to persuade the defendant to adopt the contract. Upon

the whole, I am of opinion that it is plain that Smith never considered that anything which took place with the defendant in conversation on the 25th July was of the nature of a ratification, and as I am of opinion that the letter of the 21st July contained no ratification, I do not think that there was sufficient evidence to be submitted to a jury upon the question of ratification; but, assuming that there was evidence which, if the case had been tried by a jury, would have had to be submitted to them, I have no hesitation, as a juror, in drawing the inference that the defendant never did intend to ratify, or in fact ratify, the contract, and so, pronouncing the verdict which in my judgment ought to have been pronounced by the learned Judge who tried the cause, I think the *postea* should be amended by entering a verdict for the defendant.

HAGARTY, C. J., concurred.

Rule absolute to enter verdict for defendant.

ARTHUR V. MONCK.

Agreement to convey land—Construction—County Court appeals—Manner of sending up.

Defendant agreed to execute to plaintiff a deed of certain land, with bar of dower, on payment of \$200, and on the agreement that if the Crown Lands Department would not "recognize" his assignment of said land, defendant would return the purchase money to plaintiff:

Held, that the true construction of the contract between the parties was, that the money was to be refunded in the event of the Crown Lands Department not acknowledging that defendant's vendee had, by virtue of the assignment, acquired a beneficial interest in the land, entitling him to the benefit of the contract between the Crown and the original licensee.

Observations on *the manner* of sending up cases from the County Courts on appeal to the Superior Courts.

APPEAL from the County Court of the county of Kent.

The declaration, in substance, stated that, by agreement dated, &c., it was agreed between plaintiff and defendant, who claimed to be lawfully entitled to a patent from the

Crown of the same, that defendant should sell and make a deed to plaintiff of the, &c., for \$200, upon the condition that plaintiff should pay defendant said \$200, and defendant should make a deed, with release of dower, to wife of plaintiff, and that if the Crown Lands Department did not recognize said deed, and grant a patent thereupon, defendant would return said money to plaintiff, and defendant executed said deed, which was duly submitted to Crown Lands Department by plaintiff, and a patent thereupon asked for, but the Crown Lands Department refused to recognize said deed, and refused to issue a patent thereupon to wife of plaintiff, and all conditions, &c., yet defendant did not pay said money to plaintiff, whereby plaintiff lost use of said money, and lost expense incurred by him in submitting said deed to Crown Lands Department, &c. Also common money counts.

The defendant pleaded several pleas, traversing the agreement set out, the alleged claim on his part to be entitled to a patent, and the refusal by the Crown to recognize defendant's deed, or to issue a patent for the land. There was also a plea, on equitable grounds, that defendant purchased the lands at sale for taxes, and that he only sold and conveyed to plaintiff's wife all his interest therein with limited covenants, and plaintiff and his wife had notice of defendant's title, and defendant agreed that if his deed would not be recognized by the Crown he would return to plaintiff the purchase money; that the Crown did not refuse to recognize said deed, but received the same, and recognized the transfer of all interest which defendant had, but required plaintiff, before issuing patent, to establish the validity of the tax sale, &c.

To the common counts—*Nunquam indebitatus*.

Issue on all pleas but the equitable one, to which there was a demurrer.

The following was the agreement sued on, and produced in evidence at the trial:

"It is agreed between Monck and Arthur that said Monck will execute a deed, with bar of dower, to said

Arthur, of, &c., on payment of \$200, and on the understanding that if the Crown Lands Department will not recognize his assignment of said lands he will return the purchase money to said Arthur; it being understood that making this to Mrs. Arthur to make no difference."

At the trial, evidence of a verbal agreement between the parties, as to the tax title, to the effect set out in the equitable plea, was admitted, though objected to.

An officer in the Crown Lands Department stated that there had been no refusal to recognize the deed to plaintiff's wife, or the tax deed; that the refusal to issue a patent was not owing to any defect in them, but on other grounds; nor was there any refusal to recognize the assignment to plaintiff's wife as valid; that the question was all as to the tax sale, against which they had been warned by the original locatee; that all tax deeds were being held back for future consideration, and nothing could be done until some determination as to them was come to.

A nonsuit was moved for on this evidence, and also on the ground that the agreement did not support the declaration, and that it was void for want of consideration.

The case was left to the jury, with a charge that "the action was well laid, and to find reasonably on the whole case."

The jury found for the plaintiff \$208.

In the following term a rule was obtained to enter a nonsuit, or for a new trial, which rule was subsequently discharged, when this appeal was brought.

The grounds of appeal were: 1. That the contract alleged in the first count of the declaration was not proved, nor was any breach shewn of the actual contract in writing between the parties proved and put in at the trial, and the jury should have been so directed; 2. That parol evidence was improperly admitted to add to and vary the contract between the parties, which was by law required to be in writing, and the jury should have been directed as to the meaning and construction of said con-

tract; 3. That there was no cause of action proved to entitle plaintiff to a verdict upon either count of the declaration; 4. That defendant's pleas were proved.

Christopher Robinson, Q.C., appeared for the appellant, and *J. H. Cameron*, Q.C., for the respondent. No cases were cited on either side, the contention being altogether as to the proper construction to be put upon the agreement.

GWYNNE, J.—From the manner in which this appeal is presented to us, it is difficult to say what judgment we should give, for it is impossible to determine what evidence the learned Judge submitted to the jury, or what direction he gave to them upon points of law, nor, indeed, what opinion he himself formed upon these points, either at the trial or on the subsequent argument.

The whole case, as argued before us, turned upon the construction to be put upon the terms of the agreement declared on, *Mr. Robinson*, Q.C., for the defendant, the appellant, contending that its true construction is, that the \$200 was only to be returned if the Crown Lands Department should refuse to regard the assignment as transferring to *Mrs. Arthur* all the rights, if any, which *Monck* had, and that there was no evidence that they had refused to recognize the assignment in this sense. *Mr. J. H. Cameron*, on the contrary, for the plaintiff, the respondent, contended that a construction more beneficial to the plaintiff was to be put upon the contract, namely, that it should be construed that the \$200 should be returned if the Crown Lands Department should not recognize the assignment in the sense entitling *Mrs. Arthur*, by reason thereof, to stand in the place of the original locatee, and he contended that there was evidence of their refusal to recognize the assignment in this sense, and the plaintiff, therefore, was entitled to recover the \$200, with interest, which appears to be the amount which the jury by their verdict have given.

In my opinion the construction contended for by the learned counsel for the plaintiff is the correct one. The defendant's contention in effect is, that the plaintiff was contracting only for the purchase of such title as the defendant had acquired by his purchase at the tax sale, and that the defendant, by the deed executed by him, conveyed that title confirmed by covenants against his own acts, and he contends that the effect of putting the plaintiff's construction upon the contract would be to make the defendant as liable as if he had given absolute covenants for title instead of covenants qualified to his own acts. But that is not so, for there is a vast difference between absolute covenants for title, which title both parties knew was still in the Crown, and an agreement to refund the purchase money if the Crown Lands Department should not recognize the assignment as entitling the purchaser to whatever rights the original locatee had under his contract with the Crown. If, as contended by Mr. Robinson, the plaintiff was only contracting for an assignment of the defendant's interest, whatever that was, I cannot imagine what necessity there was for any contract beyond that contained in the deed. There was no occasion, in that case, for the purchaser demanding, nor any sense in the vendor submitting to sign, an agreement for the return of the \$200 in any event, for the deed, containing on its face a perfect transfer of Monck's interest, it could not by any possibility be treated or regarded in any other light than as a transfer of such interest. It seems difficult to understand why the parties should agree that the purchase money should be returned if the officers in the Crown Lands Department should commit so improbable, so vain, and so innocuous an act as to regard the assignment as being something different from what it professed to be. It is difficult to conceive what object the plaintiff could have in insisting upon, or the defendant in consenting to, a return of the purchase money, upon the happening of an event so improbable and so harmless. The object of the contract could not have been to guard

against the possibility of Monck having made, or subsequently making, another assignment to some other person, which, by being brought to the notice of the Crown Lands Department first, should obtain a preference over the deed to Mrs. Arthur, for the covenants contained in that deed afforded a complete and superior protection against such a contingency. When, then, we find the plaintiff insisting upon, and the defendant giving, an undertaking beyond and de hors the qualified covenants contained in the deed, and not amounting to an absolute or any covenant for title, we must conclude that the object was to guard against some possible and *substantial injury* that the plaintiff, might sustain if, after getting the deed from Monck, and after having paid the purchase money, the purchase should prove to be ineffectual, as not enabling the purchaser to obtain the letters patent from the Crown, by reason of the Crown Lands Department refusing to *recognize* the purchaser from Monck as entitled to any position of privity with the Crown in respect of the contract with the original locatee. The question arises, what is meant by the term "*recognize*" in this contract? The word, in its ordinary signification, means "to know," "to recall to mind," to recollect or recover the knowledge of a thing or person," "to acknowledge." In the "Imperial Dictionary," the noun "*recognition*" is explained to be, "an acknowledgment or solemn avowal by which a thing is owned or *declared to belong to*." Now, the only danger to be apprehended by the plaintiff, and therefore the one which we must, I think, assume that he was guarding against by the contract, was the danger of the Crown Lands Department not *acknowledging* the purchaser from Monck as entitled to stand in the place of the original locatee. It seems to me, therefore, that the only meaning which can be given to the word "*recognize*," as used in this contract, is, that the contingency intended to be guarded against was the possibility of the Crown Lands Department not "*acknowledging*" that Monck's vendee had, by virtue of the assignment, acquired a beneficial

interest in the land assigned, entitling him to the benefit of the contract between the Crown and the original locatee; in other words, not "recognizing" Monck's vendee as the person entitled to stand in privity with the Crown in respect of the contract entered into with the original locatee, and in the place of such locatee; not "avowing," not "acknowledging" that the benefit of the contract between the Crown and the original locatee "belongs to" Monck's vendee.

Unless we so construe the contract, it appears to me that we *nullify it wholly*, and put a construction upon it which necessitates us to hold that the plaintiff was *labouring to protect* himself from what could do him no possible injury, and that the contingency upon which his purchase money was to be refunded was one that never could happen, and that he has failed to secure himself against default in the only recognition which could be of any benefit to him, and of which alone he stood in need.

Although this is my view of the proper construction, I think the case must go down to a new trial, in consequence of the manner in which the case, (so far as the learned Judge's report to us shews,) appears to have been treated by him at the trial. It may be important for the plaintiff to consider whether, in my view of the construction to be put upon the contract, his averment of breach in his declaration is not too large.

HAGARTY, C. J.—I agree with the view taken by my brother Gwynne as to the meaning to be attached to the word "recognize" in the contract before us. But I do not see how we can avoid allowing this appeal. The learned Judge has not thought proper to inform us in what way he directed the jury, and what was left to them for decision. After the short notice of his charge, he returns to us certain objections thereto, made by Mr. Douglas, to the effect that he ought not to have told the jury to say what the agreement was between the parties, as the agreement was in writing, and that he left it to the

jury to say whether defendant had agreed to warrant the title to plaintiff's wife, and if so to find for plaintiff. If the learned Judge so left it to the jury, we think it impossible to support the verdict, as such a direction was, we think, improper. We are not told that such a direction was not given, and must assume that, if not given, the learned Judge would have so reported to us in sending the case up.

The declaration was certainly not proved, as the agreement contains nothing about a patent issuing. It might have been easily amended if plaintiff had asked it.

I think the evidence of verbal promises by defendant as to the patent should not have been received, or, if inadvertently received, the jury should have been expressly warned not to act on anything not contained in the writing, and that, with all this evidence before them, it was a dangerous course to tell the jury that the action was well laid, and to find reasonably on the whole case.

I find some difficulty as to the main point, whether the Crown Lands Department has in substance refused to recognize the title. The contract was made in October, 1869 : the suit was commenced in April, 1870, within six months. The plaintiff, of course, is not bound to wait for ever, and I presume it would be a question for the jury, whether, in substance, the Department had refused to recognize (in the sense we understand the term), and, if the Department had really decided nothing on the subject one way or the other, whether a reasonable time had elapsed or not when the action was brought. If, in the opinion of the jury, it was still a matter substantially under the consideration of the Department, it would be a hard measure of justice to hold defendant responsible because six months had elapsed. It certainly does not seem a very unreasonable delay on the part of a public department necessarily burdened with numerous conflicting land claims.

I feel great regret at being compelled to mention the very great difficulty, I might almost say impossibility,

which the Court feels in trying to deal properly with a case sent up to us as this has been. We cannot, of course, dictate any particular mode either of trying cases or charging juries, or dealing with objections or reporting cases: we must content ourselves with expressing our painful sense of our inability to perform the duty cast upon us, by the Legislature, as a Court of Appeal from the County Courts, if the latter tribunals do not place before us fuller and more complete and satisfactory reports of all that took place before them.

GALT, J., concurred.

Appeal allowed—New trial without costs.

ELLIS V. BEAVER AND TORONTO MUTUAL INSURANCE COMPANY.

Mutual insurance—Note for incidental expenses—Nonpayment within thirty days—Nonavoidance of policy—29 Vic. ch. 38, sec. 5.

Held, that a note, made by the insured in the mutual branch of a Mutual Insurance Company, for the sum of \$3, part of the sum of \$36, for which the insured had already given his deposit or premium note, such \$3 representing the portion of the deposit note payable to the treasurer for incidental expenses under C. S. U. C. ch. 52, sec. 22, was not a note given for a cash premium of insurance within the meaning of 29 Vic. ch. 38, sec. 5, so as utterly to avoid the policy if the note should not be paid within 30 days after the same was made payable.

DECLARATION on a fire policy

Pleas,—1. *Non est factum*. 2. That defendants were a Mutual Insurance Company duly incorporated by statute, and entitled to all benefits awarded by the statute laws of this Province, and that at the time defendants made said policy plaintiff made and delivered to defendants his promissory note for \$3, as and for the cash premium of insurance to be paid to defendants, such being part of the sum of \$36 mentioned in the declaration as the premium to defendants for making said insurance; and that said promissory note, at

the time of the alleged loss, was more than thirty days in arrear and unpaid, and at commencement of suit was still in arrear and unpaid, and that by reason thereof said policy became and was absolutely null and void, according to the form of the statute.

Replication to second plea. That the policy sued upon was not a policy for a cash premium, and that before plaintiff became a member of defendants' company and received the policy, he deposited with defendants the premium note in the declaration mentioned, being for the amount of money represented by said note, the sum in that behalf determined by the board of directors of defendants; that plaintiff, at the time of depositing said premium note with defendants, was ready to pay such part of the sum, secured by said note as was necessary for discharging the incidental expenses of the institution, but defendants waived payment in cash, and accepted in lieu thereof the promissory note in the second plea mentioned, and afterwards held the same without demanding payment: that plaintiff was ready and willing to pay the amount of the last mentioned note, and after same matured, and before action, tendered and offered to defendants to pay same and brought the amount and all interest due into court ready to be paid to defendants; and that since the deposit of the first mentioned note with defendants no assessment had been made by defendants, of which plaintiff at any time before action had notice.

Demurrer—that plaintiff admitted the facts stated in defendants' second plea, and did not in any way avoid them, and thereby left said plea unanswered as a defence to the action.

J. H. Cameron, Q.C., for the demurrer, referred to 29 Vic. ch. 38.

Harrison, Q.C., contra.

GWYNNE, J.—The substantial question which arises on these pleadings is, whether a note made by a person insur-

ing in the Mutual branch of a Mutual Insurance Company for the sum of \$3, part of the sum of \$36, for which the insured had already given his deposit or premium note, and such \$3 representing in fact that portion of the deposit note payable to the treasurer for meeting incidental expenses under 22 Vic. ch. 52, sec. 22, is a note given for a cash premium of insurance within the meaning of the 5th sec. of 29 Vic. ch. 38, so as utterly to avoid the policy if the note should not be paid within thirty days after the same was made payable.

By chapter 52 of the Consolidated Statutes of U. C., sec. 21, it is enacted that, "Every person who becomes a member of a Mutual Insurance Company, by effecting insurances therein, shall, before he receives his policy, deposit his promissory note *payable to the company or some officer thereof, or to some other person, for the purpose of being endorsed by such person in favor of or to the company, or to some other officer thereof, for such sum of money as shall be determined by the board of directors.*" By the 22nd section it is enacted that, "A part of the sum secured by such note, to be determined by the board of directors, *shall be immediately paid to the treasurer for the purpose of discharging the incidental expenses of the institution, and the remainder of such note shall be payable in part or in whole at any time when the board deems the same requisite for the payment of losses or other expenses;*" and by the 24th section it is enacted that, "Any such company may collect *premiums in cash* for insurance for terms not longer than one year, and such portion of the premium note as the directors may consider equitable and necessary in all insurances for terms longer than one year;" and by the 25th section it was enacted that, "Any person insured by the company should be a member of the company so long as he should continue to be insured therein." By the 61st section the directors of the company may charge losses upon the members thereof in proportion to the amount of their deposit or premium notes respectively such sum or sums as may be necessary to pay debentures, notes, bills or

drafts of the company (which they were authorized to issue) and the interest thereon. By the 71st section the directors were authorized, upon a loss occurring, to settle and determine the sums to be paid by the several members thereof as their respective portions of such loss, and they were required to publish the same in such manner and form as they see fit, or as the by-laws prescribe. By the 75th section it is enacted that the sum to be paid by each member shall always be in proportion to the *original amount* of his deposit note or notes, and shall be paid to the treasurer within thirty days next after the publication of such notice ; and by the 76th section, " If any member for thirty days after the publication of such notice rejects or refuses to pay the sum assessed upon him as his proportion of any loss or damage, the directors may sue for and recover the whole amount of his deposit note or notes with costs of suit.

The 24th section of this Consolidated Statute is taken from 22 Vic. ch. 46, sec. 4, whereby these mutual insurance companies were for the first time empowered to collect *cash premiums* for insurance, and they were limited to one year as the period of duration for such insurance. It is this clause, and this clause only, in the Consolidated Statute, ch. 52, which has given rise to the term "*cash premium of insurance*," and the object appears to be to distinguish it from the premium note principle, which constitutes the essential difference of the mutual insurance principle. The Act nowhere speaks of a portion of the amount secured by the "deposit or premium note" as a *cash premium*. When the Legislature speaks of the amount to be paid for the purpose of discharging the incidental expenses of the institution, it provides that "a part of the sum *secured by such note*, to be determined by the board of directors, shall be *immediately* paid to the treasurer, and the residue of the note is made payable as assessments, to be made and published in such manner as the directors should see fit, or as the by-laws should prescribe (section 74). The *whole* amount of the premium of insurance is *secured by the pre-*

mium note before the insured is to receive the policy (section 21), and *thereafter* a part of the sum so received shall *immediately, upon its amount* being determined by the board of directors, be paid to the treasurer: the Legislature (having left it in the power of the directors to secure themselves as to this part, by enabling them to require its immediate payment contemporaneously with their delivering the policy to the insured), has not thought it necessary to make any special provision as to this part. The directors might, I apprehend, if they should think fit, dispense with the payment of this part of the premium note altogether, and suffer the whole premium to stand upon the security of the premium note until an assessment should be made and published; but if required to be paid under the 22nd section, it is as *part of his premium* secured already by the premium note, and not as a "cash premium of insurance," that it is paid.

Now this Insurance Company, by special Act, which is declared to be a public Act, 27 & 28 Vic. ch. 99, have obtained authority from the Legislature to "issue policies and to collect premiums thereon *in cash* for insurance for terms of two or more years (the general Act authorizing such insurances only for one year), and it was thereby provided that parties so paying in cash shall not be liable to any further charge or assessment whatever, nor shall they be held to be members of the said Association in any respect. This same Act, section 3, authorized the directors to levy an annual assessment on the premium notes for the purpose of a reserve fund without waiting for losses; and by the 5th section it was provided that in case of the failure or neglect on the part of any policy holder to pay the amount of any *premium note* given for insurance, or any assessment *thereon* on the day when the same shall be due, or within thirty days thereafter, the policy on account of which *such* note was given or assessment made shall become void and of none effect *for and during* such period as the *said* note or assessment shall remain unpaid. Now this Act, which is a public Act, contains, as it appears to

me, very plain internal evidence that the Legislature notably distinguished "cash premiums of insurance" from "premiums secured by deposit notes." Those insuring upon the former principle were to be liable to no further charge or assessment whatever, and at least, so far as this Company was concerned, were not to be in any respect members of the Company. The cash premiums of insurance are there treated by the Legislature as representing the principle upon which insurances in the proprietary branch were to be effected, and the premium secured by a premium or deposit note as representing the mutual insurance principle. The Legislature having, then, both by 22 Vic. ch. 46, sec. 4, consolidated in 22 Vic. ch. 52, sec. 24, and by 27 & 28 Vic. ch. 99, recognized a plain distinction between "cash premiums of insurance" and "premiums of insurance secured by deposit or premium notes," which are liable to assessments from time to time, appears to me to have had the same distinction present to its mind when passing 29 Vic. ch. 38. It also seems for the first time to have deemed it necessary to provide for the possibility of these Companies, (having authority to insure upon two distinct principles, namely the "cash premium" principle, and the "premium note" principle) giving credit by contract with insurers upon the cash premium principle for the amount of their premiums secured upon promissory notes, payable in full at a fixed date. Section 4 of this Act enacts that "any suit cognizable in a Division Court upon or for any *premium or deposit note* or notes, or any sum assessed or to be assessed thereon, *or upon* or for any note or notes given or to be given for "*cash premiums of insurance*" to such Company, or to any of the officers or agents thereof, may be entered and tried in the Court for the division wherein the head office of such Company is situate; and section 5 provides that "in case any note," given or to be given for a cash premium of insurance to such Company, or to any agent or officer thereof, *or any sums that may hereafter be assessed upon a premium or deposit note*, given or to be given to such Company, or to any agent or

officer thereof, shall remain in arrear and unpaid for thirty days after the same shall be payable, the policy of insurance held by the person in default shall thereupon become absolutely null and void."

The Legislature, as it seems to me, have plainly distinguished between "*a cash premium* of insurance," that is, *the whole* premium payable in one sum, or an insurance effected on the cash principle (as distinct from the deposit note principle), but for which whole premium a note was agreed to be taken, payable in one sum at a future time in lieu of cash, and *a premium*, that is, another whole premium secured by deposit note, which is payable by assessed instalments. There is nothing to indicate that the Legislature ever contemplated that the "*portion* of a deposit note which by sec. 22 of ch. 52 of the Consolidated Statutes of Upper Canada was made payable *immediately* upon the policy being effected and signed by the directors to the treasurer, to meet current expenses, should ever be secured by a note. The Legislature, in my opinion, never did contemplate that the Insurance Company should be given two notes to cover the same particular sum; that is to say, as in this case, a deposit note for \$36 to secure the *whole premium*, and a further note for \$3 to secure part of that already included in the deposit note. When therefore it appears that this Company, insuring a person in the mutual branch, took a deposit note to secure the whole amount of the premium of insurance, and a further note for part of that sum so secured to represent the "*portion*" under 22 Vic. ch. 52, sec. 22, payable to meet incidental expenses, the latter is a note given without the scope and contemplation of the Act altogether, and is not *a note given for a cash premium* of insurance within the meaning of the 5th sec. of 29 Vic. ch. 38.

To hold that the policy should be avoided by reason of the non-payment of a note so given, would, in my opinion, require a very forced construction of the Act, and one which we should not adopt except upon the most plain and unambiguous language.

By the 31 Vic., ch. 32, the Legislature of Ontario have applied to all Mutual Insurance Companies the provisions of 27 & 28 Vic., ch. 99, enabling the directors to levy an annual assessment on the premium notes to create a reserve fund, and enacting also, that "when policies of insurance are issued, and *premiums in cash* collected thereon for periods of one year, as by law provided, the person so paying in cash shall not be liable to any further charge or assessment whatever, nor shall they be held to be members of the said Company in any respect, unless so constituted by the by-laws of the Company."

There is an expression in this Act which appears to give colour to the application of the term "cash premium" to the portion of the premium note paid at the time of a policy being effected. The 3rd section enacts that "the cash premium paid at the time of insurance shall in no case be held to be part of the annual assessment. Notwithstanding this section, I am, for the reasons above stated, of opinion that the portion of the premium note contemplated by the Legislature to be in fact paid to the treasurer, to meet incidental expenses, when the policy was delivered to the insured, is not "a cash premium" for which it was contemplated that a note might be given, and that if not paid within thirty days after maturity, the policy would be avoided. Such a note might be made payable to bearer, and might be accepted as payment, and might be in the hands of a third person for value at the time of its maturity, and for more than thirty days thereafter, and until paid. Indeed, it may be said that the Legislature regarded this payment as an *assessment*, and they enacted this clause to prevent its being deemed to be part of the *annual* assessment in the *first* year which the directors were by that Act authorized to levy.

It has been objected that the replication introduces nothing not appearing in the pleas. Without determining whether this be so or not, I think, in a case of this kind, although the plea is not objected to formally, we must give judgment upon the whole matter for the plaintiff,

whose policy is not, in my judgment, avoided by the matter alleged in the plea.

GALT, J.—By ch. 52, Consol. Stat. U. C., sec. 21, every person who becomes a member of the Company, by effecting insurances therein, shall, before he receives his policy, deposit his promissory note, payable to the Company or some officer thereof, or to some other person, for the purpose of being endorsed by such person in favor of or to the Company, or to some officer thereof, for such a sum of money as shall be determined by the board of directors.

Sec. 22: A part of the sum secured by such note, to be determined by the board of directors, shall be immediately paid to the treasurer for the purpose of discharging the incidental expenses of the institution; and the remainder of such note shall be payable in part or the whole at any time when the board deems the same requisite for the payment of losses or other expenses.

Sec. 24: Any such Company may collect premiums in cash for insurance for terms not longer than one year, and such portion of the premium notes as the directors may consider equitable and necessary on all insurances for terms longer than one year.

Sec. 76: If any member, for thirty days after the publication of such notice (as to settlement and assessment of any loss), neglects or refuses to pay the sum assessed upon him as his proportion of any damage, the directors may sue for and recover the whole amount of his deposit note or notes, and costs of suit.

There is no clause in this Act for making policy void for non-payment of assessments.

The next Statute, 1861, 24 Vic., ch. 47, alters the above 76th section, but makes no provision forfeiting policy for non-payment.

The next Statute, 1864, 27 & 28 Vic., ch. 38, has no relation to forfeiture for non-payment.

The same year, 1864, ch. 99, an Act was passed granting certain powers to the defendants.

Sec. 2 : The said association may issue policies and collect premiums thereon in *cash* for terms of two or more years, and parties so paying shall not be liable to any further charge or assessment whatsoever, nor shall they be held to be members in any respect.

Sec. 4 : Whenever any assessment is made on any premium note given to the association for any risk taken by the association, or as a consideration for any policy of insurance issued or to be issued by the association, &c. (I cite this merely to point out that there are two classes of notes referred to in the Act.)

Sec. 5 : In case of the failure or neglect, on the part of any policy holder, to pay the *amount of any premium note* given for insurance or any *assessment* thereon on the day when the same shall be due, or within thirty days thereafter, the policy on account of which such note was given, or assessment made, shall become void and of none effect for and during such period as the said *note* or *assessment* shall remain unpaid.

Secs. 74 and 75 of ch. 52, Consol. Stat. U. C., apply to assessments. There was no assessment made in this case as regards the \$3.

29 Vic., ch. 37, sec. 5 : In case any note given or to be given for a *cash premium* of insurance to such Company, or to any agent or officer thereof, or any sum that may hereafter be assessed upon a *premium or deposit note*, given or to be given to such Company, or to any agent or officer thereof, shall remain in arrear and unpaid for thirty days after the same shall be payable, the policy of insurance held by the persons in default shall thereupon become absolutely null and void.

This is the first *general* clause making policies void.

31 Vic., ch. 32, sec. 3 : The cash premium paid at the time of insurance shall in no case be held to be part of the annual assessment. (Sec. 6 refers to the annual assessment, but does not apply to this case).

Sec. 8 : In addition to the notices now required to be published, it shall be the duty of every Mutual Insurance

Company to mail to the person assessed a notice containing the particulars of the assessment against such person.

From a consideration of the foregoing enactments, it appears to me that Mutual Insurance Companies generally and the defendants specially, are enabled to issue two different kinds of policies having different effects; the first, on a premium or deposit note basis, and persons insuring on this principle are alone members of the Company, and such insurances may be for any term not exceeding seven years. As an incident to a policy of this class, a part of the sum secured by the note is to be paid in cash, to provide for the incidental expenses of the Company. The second, for a cash premium: persons thus insuring are not members of the Company, and the policy must not be for more than two years.

There does not seem to be any objection to the Company accepting notes from parties desirous of insuring on the cash basis, but, on the contrary, from sec. 5, 29 Vic., ch. 37, the Legislature appears to have provided for such a case, because it is enacted that "in case any note given or to be given for a *cash* premium of insurance to such Company, or any sum that may hereafter be assessed upon a *premium or deposit note*," shall be in arrear and unpaid for thirty days, the policy is to be absolutely void. The distinction is here distinctly drawn by the Legislature and points to both classes of notes, and secures the payment of the money secured by each by a severe penalty on the defaulter. It is to be remembered that, although by the Act of incorporation of these defendants, 27 & 28 Vic., ch. 99, the non-payment of a premium note, or assessment thereon, for thirty days, worked a forfeiture of the policy, the 29 Vic., ch. 37, was the first Act which extended this penalty to Mutual Insurance Companies generally, although they had been in existence since 6 Wm. IV. The note in question does not appear to me to fall under the head of an assessment on a premium or deposit note; it appears to have been accepted by the Company as payment of the incidental expenses of the policy in place of cash, and, as

such, to be held by them simply as the note of any person having no connection with the Company. It was a debt due to them in the ordinary manner, to be collected in the ordinary way. Suppose, in place of giving his own note, the plaintiff had handed over the note of a third party, and the Company had accepted it, could it be successfully contended that the non-payment of such a note would occasion a forfeiture of plaintiff's policy? In my opinion, based on the provisions of the Acts above referred to, the forfeiture of a policy can be occasioned only by non-payment of a cash premium note, or by non-payment of an assessment duly made and notified on a deposit premium note, and that the note in question does not fall under either head.

HAGARTY, C. J., concurred.

THE CORPORATION OF THE COUNTY OF YORK V. THE CORPORATION OF THE CITY OF TORONTO.

County buildings—Separation of city from county for judicial purposes—Agreement to pay for use of court house—Release by operation of law.

In consequence of the separation of the City of Toronto from the County of York for judicial purposes, a deed was executed between the respective corporations, in which the city covenanted to pay the county a certain annual sum for the use of the court house. The deed also contained other agreements as to use of gaol. This arrangement was to continue in force until twelve months' notice to determine it should be given. By the "Law Reform Act," which came into force in February, 1869, the city was re-united to the county for judicial purposes, and on 21st March, 1869, the city gave the county the stipulated notice as to intended discontinuance of use of gaol, stating that, as to the court house, the action of the Legislature had virtually terminated the provision respecting it, and that no further payment would therefore be made:

Held, that the city had been released from its covenant to pay for the court house by the Law Reform Act, and also that there was no liability for an aliquot portion of the half-year's rent which would have become due on 21st March following.

THIS was a special case for the opinion of the Court, the facts of which are sufficiently stated in the head-note and judgments of the Court.

Kerr, for the plaintiffs, cited *Davis v. Cary*, 15 Q. B. 418; *Dwarr. Stat.* 534.

M. C. Cameron, Q.C., contra, referred to *Snarr v. Baldwin*, 11 C. P. 362, per Draper, C. J.

The Statutes cited are noticed in the judgments of the Court.

HAGARTY, C. J.—The Statute 24 Vic., ch. 53, enacted that from and after 1st July, 1861, the City of Toronto should be deemed a county for all judicial purposes, with its own separate Courts of Assize and Oyer and Terminer, and County Court and Quarter Sessions; that the court house and county buildings belonging to the united counties should continue to be county property, and the city should be bound to pay for the use and occupation of the county buildings, or any of them, such yearly sum as should be agreed on, and, in default of agreement, to be settled by arbitration.

25 Vic., ch. 24, amends this Act, providing that there shall not be a separate County Court, but that there should be separate sittings for the city, and for payment to the city of jury fees paid on cases there entered.

On 6th June, 1864, a deed was executed between the parties, reciting the Statute 24 Vic., ch. 53, and declaring that, in pursuance of the Act, an agreement had been made that the city should have the use of the court house in the Act mentioned, and should pay the county for the use of the same \$1400 yearly. Then follows an agreement by the county, in pursuance of the said Statute, that the city might, for the period of five years from the 24th March, 1864, use the court house as a court house for the city, for the holding of courts therein, and for all purposes connected with the administration of justice, in the same manner as the same had been and then was used by the county, so as the holding of said Courts should not interfere with the times when the Courts should be held for the counties. Then follows a covenant by the city to pay the county for the use of the court house as aforesaid the

yearly sum of \$1400 half-yearly, 21st March and 21st September. The instrument contained other agreements as to the use of the gaol, but wholly unconnected with the use of the court house, and the \$1400 is exclusively payable for the latter purpose: it is to continue in force five years, and if a twelve months' notice is given it is to end then, but if no such notice, then to continue till a twelve months' notice be given.

On 21st March, 1869, notice was given by the city to terminate the agreement as to the gaol in one year therefrom, and, as to the court house, as the Legislature had re-united the city and the county, the arrangement of *10th February, 1864* (query, *6th June, 1864*?) was at an end on the day the Act was passed, and that no more payments would be made.

The Law Reform Act, 32 Vic., ch. 6, sec. 22, re-unites the City of Toronto to the County of York for judicial purposes. Sec. 24 declares that nothing therein should affect the existing arrangements between the city and county respecting the use of the gaol. Sec. 10 abolishes the Recorder's Court, and the Courts of Assize and Oyer and Terminer for the City of Toronto. The Act came into force 1st February, 1869.

The Municipal Act of 1866, sec. 403, provides that when a city or town uses a court house, &c., it shall pay compensation therefor, as may be mutually agreed or settled by arbitration under the Act.

The parties seem to agree on all the points in the case except one, viz., whether the city, since the Law Reform Act, is released from its covenant to pay \$1400 per annum for the use of the court house. The plaintiffs insist that the city is not released, and ought still to pay, as in reality half the business of the Courts arises from the city.

I am of opinion that when a municipal corporation, created by Statute for certain specified purposes, enters into an obligation like that before us, not for any gain or profit to itself, but merely in order to fulfil an obligation cast on it by the Legislature, that if the paramount autho-

city wholly relieves it from the performance of that duty, and renders it impossible any longer to avail itself of that for which it contracted, it is no longer liable. The city here was bound to hold certain Courts, and necessarily to provide accommodation for them; it agrees to pay the county for the use of the court house to hold those Courts; it is then forbidden and rendered incapable of holding such Courts, and must, I think, be held released from its contract to pay. We are not embarrassed here by the fact that the county, on the faith of the city's contract, gave any permanent consideration to the latter, or did any act impossible to undo: the ceasing of the obligation simply leaves the parties as they were.

In *Lord Anglesea v. Churchwardens of Rugely*, 6 A. & E. 112, the law is somewhat noticed in the argument. *Brewster v. Kitchell* (1 Salk. 198) is quoted: "If H. covenant to do a thing which is lawful, and an Act comes in and hinders him from doing it, the covenant is repealed." Lord Denman says, "Even if the condition were not performed, it appears to us that the non-performance would in this case be excused, as being by act of law and involuntary on the part of the lessees." There seems no doubt that a forfeiture does not take place for the non-performance of a thing rendered impossible by subsequent legislation. In *Snarr v. Baldwin* (11 C. P. 362), the subject is partly discussed in the judgment of Draper, C. J.: "The language used by Sir N. Tindall in *Ewen v. Hutton* (4 M. & G.), tends strongly to shew that a contract may be dissolved by superior authority, so that the contractor is relieved from performance. * * * If an Act had been passed prohibiting the erection of the esplanade, there is, I apprehend, no doubt that the plaintiff would have been relieved from his covenant to erect it."

In *Taylor v. Caldwell* (3 B. & Sm. 833), the general law is discussed by Blackburn, J. In *Hall v. Bright* (El. B. & El. 789), Martin, B., says: "The general rule upon the subject is, that when a person by his covenant creates a duty or charge upon himself, he is bound to make it good if he

may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his conduct," citing the well-known case of *Paradine v. Jane* (Aleyn, 26), where it is also laid down, "When the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, then the law will excuse him;" and Lord Ellenborough, in *Bankes v. Hodgson* (3 M. & S. 267), says: "If indeed the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and the defendant, inasmuch as he had been compelled to abandon his contract, would have been excused for the non-performance of it, and not liable in damages." See also note to *Walton v. Waterhouse* (2 Wms. Saund. 422).

The subject is again noticed in the very recent case of *Lord Clifford v. Watts* (L. R. 5 C. P. at page 586), by Willes, J., and the distinction pointed out between a duty or charge created by the law and a duty or charge created by the party's own contract. He says that when the act to be done was prohibited by the law of this country, the act would be illegal, and the defendant excused, *not because he could not, but because he ought not to do it.*

It may be urged that here the defendants created the charge by their covenant, and it is not illegal for them to perform it. The answer is, I think, that this covenant was solely and avowedly made in pursuance of the duty cast on them by the law as it then stood, and that in the case, at least, of a municipal corporation, it may be well said, that when, by the alteration of the law, the duty ceases, it cannot be a proper application of their funds, raised from the rates, to pay for accommodation for courts of justice which they can no longer hold, which, in fact, had ceased to exist. It would be an annual misappropriation of the corporate funds. I do not see how we can hold that, if it be illegal for the city, as it certainly is, to use the court house for holding its Courts, it is not illegal to force the ratepayers to pay annually a considerable sum

for the means of doing something that could not legally be done. It might possibly be also urged that the county should not have the assistance of the law to recover money for a use of its court house, which use could not be lawfully exercised. Neither party, when this contract was made, could reasonably contemplate that this law would be altered.

In *Bailey v. DeCrespigny* (L. R. 4 Q. B. 185) it is said: "When the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened. * * * The rule laid down in *Brewster v. Kitchell* rests upon this ground, that it is not reasonable to suppose that the Legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the Legislature itself prevented his fulfilling."

I think on this point the defendants are entitled to my judgment. The residue of the contract, being quite separable from this portion, as to the gaol and prisoners, remains undisturbed.

In *Wynn v. Shropshire Canal Company* (5 Ex. 440), Pollock, C. B., says: "The Legislature has made it unlawful for the defendants to perform the covenants in the deed, even supposing them to have been originally valid, and it would be absurd to suppose that an action would lie against parties for doing that which the Legislature has said they shall be obliged to do. The obligation which the defendants entered into by the deed has, by the subsequent act of the Legislature, been rendered impossible to be performed, and it must be taken for granted that due provision has been made by the Statute for compensating the plaintiff for the loss which this intervention of the Legislature may have occasioned." See also *Platt on Covenants*, 588.

The Act by which I think the defendants stand relieved from this covenant came into force 1st February, 1869. A half-year's rent or payment would become due on the 21st day of March following. The plaintiffs contend that they ought to receive at least a proportionate part of the current half-year. Under the rule governing the payment of rent when the demise ceases or tenant evicted during a current quarter or half-year, there could be no apportionment of the rent. *Clunis's Case* (10 Co. 128 a): "If the land evicted or lease determines before the legal time of payment, no rent shall be paid, for there shall never be an apportionment in respect of part of the time, as there shall be upon an eviction of part of the land." Stat. 11 Geo. II., ch. 19, sec. 15, provides for payment of a proportion to the representative of a deceased tenant for life; and see *Slack v. Sharp* (8 A. & E. 366); *Woodfall* (1867) 348.

In the note to *Clunis's case* (edition of *Coke*, 1826, Thomas & Fraser), there is a notice of the cases, and a statement that "periodical payments of every description, becoming due at fixed intervals, are not apportionable by the common law." The judgment of DeGrey, C. J., in *Howell v. Hanforth* (2 W. Black. 1016) supports this as to annuities. *Wilson v. Harman* (2 Vesey, senr. 672) distinguishes the case of interest on mortgage, &c., which is said not to be an entire thing, but accruing *de die in diem*. See also *Pearly v. Smith* (3 Atk. 260).

In England, the Act 4 & 5 Wm. IV., ch. 22, provides for most cases, not merely of rents, but "payments of every description made payable or coming due at fixed periods," and where the interest is determined by death, "or by any other means whatsoever." This Statute is commented on in *Beer v. Beer* (12 C. B. 67); *Regina v. Treasury Commissioners* (16 Q. B. 361); *Brown v. Amyot* (3 Hare, 173). I am not aware of any similar enactment in this country.

I am of opinion that there can be no apportionment of the money under this covenant, which seems entire and indivisible.

GWYNNE, J.—Prior to the passing of 24 Vic. ch. 53, the City of Toronto constituted part of the United Counties of York and Peel for judicial purposes; the Corporation of the City of Toronto existed as a corporate body for municipal purposes only. That Act was passed for the purpose of separating the city from the united counties for judicial purposes. Upon the passing of that Act the city became separated from the united counties for all purposes, judicial as well as municipal. The Act accordingly provided that there should be separate sittings for the United Counties and for the City respectively of Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, and of the County Court and Court of Quarter Sessions, and of every other court for the trial of causes by a jury. By the 11th section it was enacted that, “The court house, county gaol, shire hall, and other county buildings belonging to the said united counties shall, notwithstanding they may be within the limits of the city, continue to be the property of, and to be used by, said united counties, and shall be held to be within the county and city respectively for all purposes of the administration of justice;” and by the 12th section it was enacted that such court house, gaol, and other county buildings *may be used as* the court house, gaol, house of correction, or other public buildings of and for the city, subject to such arrangement as may be made between the municipal councils of the city and united counties respectively; and by the 14th section it was enacted that “the city shall *be bound* to pay for such use and occupation such yearly sum to the corporation of the united counties as may be agreed upon by the said councils;” and by the 15th section, “In case of nonagreement the sums to be paid shall be awarded by arbitrators in the manner provided by the 26th and 38th sections of chapter 54 of the Consolidated Statute of Upper Canada;” and finally by the 16th section it was enacted that “the county council may make an arrangement at any time with the city council for the lodging and maintenance of county prisoners in the city gaol, in like

manner as the city council may arrange with the county council for the lodging and maintenance of city prisoners in the county gaol." The Act then conferred on the corporation of the city *the right to use* the court house, gaol, and other county buildings as the court house, gaol, house of correction, &c., of the city ; and it imposed upon the united counties the obligation of permitting the city to use these buildings *as their own*, and, in recompense for the right so conferred upon the city, the obligation of paying *for such user* such sum as the corporations should, through their councils, mutually agree upon, and in default of agreement, as should be awarded under the statute.

The recitals which are contained in the indenture, made upon the 6th day of June, 1864, shew that the object of the respective corporations of the united counties and of the city in executing that instrument was to discharge the obligation imposed upon the city by the 14th section of the Act ; *and also* for the purpose of making the arrangement referred to in the 16th section, the entering into which was purely voluntary and discretionary with both parties.

Accordingly, after reciting the obligation imposed upon the city by the 14th section, and that an agreement had been come to between the parties that the city should have the use of the court house *as in the said Act mentioned*, and should *pay for the use of the same* the yearly sum of \$1400, the corporation of the city covenant to pay *for the use of the same as aforesaid* the yearly sum of \$1400 by equal half-yearly payments, on the 21st day of September and March in each year. Now here is no demise for a term with a reddendum of rent, or a covenant to pay rent in each and every year, which of course would refer to the term ; but here the defendants have by statute a right to use the court house for the separate judicial purposes as long as they please, (which right must of course be limited by the duration of their separate existence for judicial purposes) subject to an obligation to pay *for such user*, *which user*, (that is, for the separate judicial purpose) cannot extend beyond the limit of the duration of the sepa-

rate existence for judicial purposes; and the covenant is executed to perfect that obligation. The covenant as to the continuance of the agreement for five years operates merely as a restraint upon the city voluntarily determining the agreement without notice. Reading then this instrument in connection with the clauses of the Act of Parliament which it recites, it must in my judgment be construed as a declaration by both parties to the instrument that it is in discharge of the obligation imposed by the Legislature upon the city by the 14th section of the Act, and not for any other purpose that the instrument was executed, and the covenant in effect is a covenant by the city to pay the counties for *the use of the court house, in the manner required by the Act, for the purpose of the administration of justice by the city, as a separate county for judicial purposes*, the sum of \$1400 in half-yearly payments of \$700, on the 21st days of September and March *in each and every year*" of such user.

Then the Ontario Statute 32 Vic. ch. 6, sec. 22, repeals seriatim sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, *fourteen*, and fifteen of 24 Vic. ch. 53, leaving section sixteen alone of that Act unrepealed, which enabled the respective corporations at their discretion voluntarily to make mutual arrangements as to the maintenance of prisoners, and not only are the sections which constituted the City of Toronto a county separate from the united counties for judicial purposes, and the clauses authorizing the city to use the court house and other public buildings of the county *as the court house, &c., of the city*, and the section 14 imposing the obligation upon the city to pay the counties for that accommodation, specially repealed; but it is further declared that from the time of the Act taking effect the City of Toronto shall thenceforth for judicial purposes be reunited to *and be part of the County of York*. Since the passing of that Act the City of Toronto by force thereof, as part of, and only as part of, the County of York for judicial purposes, has user of the court house for such purposes; if it has any user of it

as a separate county for municipal purposes only, that is a wholly different user from that referred to in 24 Vic. ch. 53, or in the covenant.

The Legislature, then, having extinguished the existence of the city as a separate county for judicial purposes, and having thereby extinguished the capacity of the city to use the court house as a separate county for judicial purposes, as contemplated by 24 Vic. ch. 53, and having done away with *such user* in fact, and having expressly repealed the obligation imposed upon the city to compensate the county *for such user*, it appears to me to follow, as a necessary consequence, that the covenant, which was only given for the purpose of meeting that obligation, becomes extinguished also.

When a covenant is entered into under the direction of an Act of Parliament, and for the sole purpose of giving effect to that Act, it must, in my judgment, perish with the Act, to which alone it owes its existence.

It appears to me that this case may be decided in favor of the defendants also, upon the principle that from the terms of the instrument containing the covenant it is apparent that the events which have happened constitute in fact no breach of the covenant declared upon; that is to say, that the terms of the contract itself shew that the continuing existence of the city as a separate county for judicial purposes is a condition necessary to the continuing existence of the covenant; for it cannot be said that the nonpayment of the \$1400 per annum by the city, after being deprived by the Legislature of its capacity to use the court house for the purpose for which the covenant provided compensation, and after the city, as a consequence of such legislative deprivation, of necessity ceased to enjoy such user, is a breach of a covenant, which I read this covenant to be, to pay for the user of the court house for the separate judicial purposes "*in each and every year*" (of such user): the provision, that the agreement shall continue in force for five years, subject to determination by a year's notice, must clearly, as it seems

to me, be construed merely as imposing a restraint upon the city, while having the capacity to use the court house for the special purpose designated, terminating the agreement by the exercise of its will without the required notice.

If the city, as a separate county for municipal purposes only, requires to use and does in fact use the court house for any purposes, that is not a user for which the covenant was given, and for any such user, if any there be, if the parties cannot mutually agree, provision must be made by arbitrators under the Municipal Institutions Act, section 403. I agree that there is no Act of Parliament in force in this country by which the plaintiffs can claim any portion of the money agreed to be paid for the half-year current when 32 Vic. ch. 6, was passed, and if the provisions of the Imperial Act 4 & 5 Wm. IV., ch. 22, were in force in this country, it appears to me to be doubtful that they would meet a case situated as this is.

The verdict must be for the defendants and \$199.36.

Rule accordingly.

CORPORATION OF THE TOWNSHIP OF NOTTAWASAGA V. BOYS.

Non-resident land fund—Non-appropriation by county council—Payment by treasurer to township—Reeve—Action by township against treasurer—Nonsuit.

Held, that all moneys received by the county treasurer from non-resident land tax, either from the owners, or from the proceeds of tax sales, do not become in his hands the moneys of any particular municipalities, so as to entitle them to sue him at once as for their moneys, but that such funds must be considered as belonging to the county council, whose duty it is to appropriate them as by law directed; and therefore, *Held*, that an action for money had and received would not lie against the treasurer, at the suit of a township municipality, for moneys paid over by him, before such appropriation, to the township reeve, who had misapplied them.

Quære, whether an action would lie against the treasurer in any case for non-payment, or whether he could discharge himself by payment to the reeve.

DECLARATION on common money counts.

Pleas,—never indebted and payment.

At the trial, at Barrie, before Gwynne, J., it appeared that defendant was treasurer of the County of Simcoe, and that the action was against him for money had and received to the plaintiffs' use.

The township of Nottawasaga was entitled to a share of the nonresident land fund, and during the years 1868 and 1869 defendant had paid several sums to their treasurer on account thereof, and also several other sums to one Thornberry, who during those years was reeve of Nottawasaga. Thornberry was stated to have absconded and not accounted to the plaintiffs for these moneys, and the action was brought therefor. Defendant had paid all either to the treasurer or to the reeve.

It appeared that no by-law had been passed under the statute for the payment of this fund to the different municipalities. The defendant stated in his evidence that he had not waited for any by-law or authority from the county council directing payment to the townships.

It appeared that defendant kept an account with each of the municipalities as directed by section 158 of Assessment Act of 1866. These accounts were in the habit of being printed in the annual statements of the county council, and Nottawasaga had a debtor and creditor account with the county treasurer. The township was credited with these nonresident taxes, and debited with the payment both to their treasurer and the reeve.

It was contended at the trial and in Term that payment to the reeve was sufficient, but nothing was left to the jury on that or any other point.

Defendant had furnished accounts to plaintiffs fully admitting all the amounts in his hands to their credit.

Defendant always urged the plaintiffs not to charge him with the defaults of their reeve, and offered to leave the matter with plaintiffs, and if they, on full consideration, decided that he ought to pay, that he would do so.

It was objected that the action did not lie against defendant individually, but should have been against the corporation, whose servant he was ; that he did not receive

any moneys to plaintiffs' use, and that till a by-law was passed by the county no action lay, and that payment to the reeve was a good discharge.

Leave was reserved to move on these points, with power to the Court to draw inferences. Plaintiffs had a verdict for \$1456.31.

In Michaelmas Term *Harrison*, Q.C., obtained a rule on the leave reserved, to which *McCarthy* shewed cause, citing *East Nissouri v. Horseman*, 16 U. C. 556; *Perry v. Corporation of Ottawa*, 23 U. C. 391; *Harwich v. Gant*, 5 E. & B. 182; *Austin v. Simcoe*, 22 U. C. 73.

[The Chief Justice referred to *Caledonia v. Farrell*, 27 U. C. 321.]

Harrison Q.C., contra, cited *Robertson v. The Corporation of the County of Wellington*, 27 U. C. 336; *Walsh v. Leahy*, 18 C. P. 48; *Corporation of Mara and Rama v. Corporation of Ontario*, 13 Grant 347.

The statutes cited are referred to in the judgment of the Court, which was delivered by

HAGARTY, C.J.—Two very important questions arise here.

1. Whether the action lies against the treasurer at all.
2. Whether the treasurer can be responsible for money received to plaintiffs' use till the county by by-law have appropriated these moneys.

It may be convenient to discuss the latter question first.

The assessment law of 1866, and the Ontario Act passed January, 1869, cover between them the periods over which these accounts extend. They are very similar in their terms on this subject.

I quote from the Act of 1866. Section 156 directs that the council may by by-law direct that all the moneys received by the county treasurer on account of taxes on non-resident lands shall be paid at stated periods to the several local municipalities to which such taxes were due, or shall constitute a distinct and separate fund, to be called the "Non-resident Land Fund" of such county.

Section 158 : The treasurer shall, when such fund may have been created, open an account for such local municipality with the said fund.

Section 166 : The council may from time to time pass by-laws apportioning the surplus moneys in the Non-resident Land Fund amongst the municipalities ratably, according to the moneys received and arrears due on account of the non-resident lands in each municipality, but such appointment shall always be so limited that the debentures unpaid shall not exceed two-thirds of the whole amount to the credit of the fund.

Previous sections had authorized the issuing and negotiation of debentures upon the credit of the Non-resident Fund.

Section 168 directs the treasurer to submit to the council annually a report, certified by the auditors, of the state of the fund.

Section 169 : Such report shall shew all moneys received and expended, distinguishing the sums received on account of, and paid to, the several municipalities, and received and paid on account of interest on debentures, &c.

Section 201 declares that any person aggrieved by the default of chamberlain or treasurer may recover from the corporation of the city, county, or town, the amount due or payable to such person, as money had and received to his use.

The plaintiffs' case, as presented, rests on the assumption that all moneys received by the treasurers from or for this Non-resident Fund, and to which by law their municipality would become entitled, become by such receipt money received to their use.

It may be asked at what moment does it acquire this character, instantly on its receipt, or when ?

The 157th section quoted above empowers the county council to direct that such moneys shall be paid *at stated periods* to the local municipalities, *or* they may constitute a different and separate fund thereof, and when such fund is created the treasurer opens the account with such municipality therefor.

And again (section 167), 'the county council may pass by-laws appointing the surplus moneys in the fund amongst the municipalities ratably, according to the moneys received and the arrears due. There is no clear evidence that the county council ever, in the words of section 156, created a distinct and separate fund called the "Non-resident Land Fund."

The defendant says: "I keep a separate account with every township of the amount I receive in respect of the Non-resident Land Fund in that municipality, and I charge the township separately with any sums paid on their account. I have not waited for any by-law or authority from the county municipality directing payment to the townships.

No attempt was made to shew any express authority given by the county council to the treasurer to pay the moneys to the townships. Annual statements were, it seems, published shewing the payments made by defendant to the townships, and his accounts were audited annually.

But the case was not rested or pressed on any authority from the council express or implied, nor from the recognition of any course of dealing.

As I understand it, the plaintiffs' right to recover is rested on the proposition that the moneys received by the treasurer from non-resident taxes, or from sales therefor, of lands in Nottawasaga, become in his hands the moneys of that township, and recoverable from him as such.

I feel great difficulty in acceding to any such proposition.

The treasurer is the servant of, and officer of the council; he gives security to his employers for the due performance of his duties, and they are specially answerable, as already noticed, for moneys received by him.

The Municipal Act, 1866, section 161, directs his appointment and securities.

Section 162: "That he shall receive and safely keep all moneys belonging to the corporation, and shall pay out the

same to such persons and in such manner as the laws of the province and the lawful by-laws or resolutions of the council direct ;" and he shall not be liable to any action at law for any moneys paid by him in accordance with any by-law or resolution passed by the municipal council of which he is treasurer.

Section 172 directs the council in the auditors' report to audit and allow the accounts of the treasurer, and all accounts chargeable against the corporation.

Section 174 : Every county council shall have the regulating and auditing of all moneys to be paid out of funds in the hands of the treasurer.

I am of opinion that all moneys received by the treasurer from non-resident land tax, either from the owners or from proceeds of tax sales, do not become in his hands the moneys of any particular municipalities, so as to entitle them to maintain an action at once against him as for these moneys. I think, on the contrary, that moneys so paid should be considered as the moneys of the county council, whose duty it becomes to appropriate the same as by law directed. The council may be considered as receiving it on certain statutable trusts.

I think the county may either by by-law direct how and at what stated periods these moneys shall be distributed (sec. 156), or they may create a distinct fund, and may issue debentures on the credit thereof, and do various acts in relation thereto. Till some action is taken by the county under the Statute, I cannot see how the treasurer can be called on by the plaintiff to pay. Even if we held that the annual auditing and approval of the treasurer's accounts afforded evidence that the county council approved of his paying the municipalities, the utmost extent of such evidence ought to be, a sanctioning of payments made by him as he reported he had paid them, not, as it seems to me, as a direction to pay, or authority to pay, further sums still claimed by the plaintiffs as unpaid, and as still in his hands.

The treasurer returns his payments made to the plain-

tiffs, and amongst others appear the payments made to the reeve, Thornberry, naming him. In the printed account put in he debits plaintiffs with \$620 carried to county assessment, being, I presume, their contribution to the county rate. All the statutable provisions seem to me to be against plaintiffs' contention, that any moneys received from this source became at once their moneys. I think the action fails on this ground.

A judgment of the late learned Chancellor VanKoughnet is directly against plaintiff's contention: *Corporation of Mara v. Corporation of the County of Ontario* (13 Grant, 352): "The claim of plaintiff is to moneys arising from the non-resident land tax. These moneys are not payable, even by the county, to any of the townships, until a by-law properly apportioning them has been passed by the county council in its discretion, and this discretion may be exercised according to circumstances. * * * How can they call upon the county for payment of moneys which have not yet legally become theirs by any appropriation by by-law of the council? If the treasurer or the county has sent the township certain moneys, let the townships be thankful and credit them; but the sending by the county, or the receipt by the township, of these, does not create in the county the liability to pay any more, or give the township the right to call the county to account for moneys which the county was never bound to pay over to them, though they sent them, or part of them, in advance of that liability."

In *Robertson v. Corporation of Wellington* (27 U. C. R. 341), it is said, speaking of the non-resident land fund, "We think this fund is the property of the county so far as to make them liable therefor." I do not think any thing done, said, or written by the defendant, has created any new binding contract on good consideration to make him personally responsible to the plaintiffs.

In the view I take, it becomes unnecessary to decide whether an action lies in any case against a treasurer for non-payment. Under some sections in the Statute it may

be that such action may lie for some particular moneys, but I express no opinion thereon. It is equally unimportant to this decision to discuss the question whether defendant could support a payment to the reeve as a sufficient discharge.

Rule absolute to enter nonsuit.

LOW V. HICKS.

Ejectment by Sheriff's vendee—Production of ven. ex. and deed reciting fi. fa.—Evidence.

Held, in ejectment by the Sheriff's vendee of land, under sale on *fi. fa.*, that the production of the *ven. ex.* under which the sale took place, and of the Sheriff's deed, which recited the *fi. fa.*, was sufficient *prima facie* evidence to enable plaintiff to recover against the judgment debtor.

EJECTMENT, tried before Galt, J., at the last Picton Assizes.

The only evidence offered by the plaintiff was the *ven. ex.* under which the land had been sold and the Sheriff's deed of the same, which recited the *fi. fa.* lands and its return. The defendant's counsel moved for a nonsuit, but the learned Judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit or a verdict for him if the Court should think the evidence insufficient to support the verdict for the plaintiff.

R. P. Jellett obtained a rule *nisi* accordingly, to which *C. S. Patterson* shewed cause, citing *Rowe v. McNeil*, 13 C. P. 189; *Ralston v. Hughson*, 17 C. P. 364.

Jellett supported the rule.

GWYNNE, J., delivered the judgment of the Court.

Doe Brittin v. Mewless (8 M. & S. 110) is authority that it was not necessary to produce a judgment to support the sale.

In *Doe Spafford v. Brown* (3 O. S.), to an ejectment by the Sheriff's vendee, the defendant objected, 1st, that no evidence was given of the delivery to the Sheriff of the writ of *fi. fa.* under which the lessor of the plaintiff contended the lands were sold; 2nd, that no evidence was given of the lands having been seized by the Sheriff; and 3rd, that no evidence was given of the actual sale of the lands by the Sheriff. Robinson, C. J., delivering judgment, says: "We are all of opinion that there is nothing in these objections. As to the first three objections, the very conveyance from the Sheriff is itself *primâ facie* evidence that the writ was delivered to him, that he took the lands in execution and sold them." And again, "The seizure of the lands is implied in the sale, and the sale is proved by the conveyance, *in which the several formalities are recited by the Sheriff under his seal, and alleged to have been duly observed.* It was open to the defendant to controvert any of the facts *if the recital was mere invention.*" In *Doe Boulter v. Fergusson* (5 U. C. R. 518), Robinson, C. J., again says: "*Primâ facie*, the purchaser's title is good when the sale is made upon a legal writ, and a defendant seeking to defeat it, on the ground of any defect in proceedings anterior to the writ, *must shew clearly and conclusively that there were those defects.*" In *Mitchell v. Greenwood* (3 C. P. 469), Macaulay, C. J., says, "The cases shew sufficiently, I think, that credit is to be *primâ facie* given to the Sheriff's return *and recitals in his deed*, as part of the *res gestæ*, and he is presumed to have acted *bonâ fide* in the discharge of his official duty." In *Delisle v. Dewitt* (18 U. C. 158), Robinson, C. J., again says: "We think when the plaintiff produced a Sheriff's deed, made under a *fi. fa.* against lands, and proved a sale under the *fi. fa.*, both good for anything that appeared to the contrary, he shewed a good *primâ facie* title, and if there was anything done irregularly which would affect the title, it should have been shewn."

Now, to apply these decisions to the case before us, we find the Sheriff's deed reciting the issue out of the Court

of Common Pleas of a writ of *fieri facias* against defendant's lands, at the suit of William Perry, dated 15th December, commanding the Sheriff to levy thereunder, out of defendant's lands, the sum of \$606.15, and the delivery of that writ to the Sheriff, to be executed on the 22nd December, 1868; the seizure by the Sheriff thereunder of the land particularly described in the deed; the inability of the Sheriff to sell for want of buyers; the return of the writ of *fieri facias* by the Sheriff, with such return thereon; the issue thereupon out of the Court of Common Pleas, on the 13th July, 1870, of a writ of *ven. ex.*, whereby the Sheriff was required to expose the said lands so seized and to sell them to the highest bidder; his exposing the lands for sale on 23rd July under and by virtue of the said writ of *ven. ex.*, after due notice, and his selling the lands to the plaintiff, who was the highest bidder at the sale; and by virtue of the said writ of *ven. ex.*, and by force of the Statute in that behalf, he conveyed to the plaintiff the lands so sold. Upon the authority of the cases above cited, the production of this deed alone would have been sufficient *primâ facie* evidence of plaintiff's right to recover; but the plaintiff went further, for he produced the *ven. ex.* under the seal of this Court. This writ recited the issue of the *fieri facias* against lands, and the Sheriff's return thereon, that he could not sell lands seized for want of buyers; and upon such return the writ of *ven. ex.* issues commanding the Sheriff to sell for the best price. Here is a record of the Court, reciting not only the judgment, but the issue of the writ of *fieri facias* under which the lands were seized, and the Sheriff's return. There cannot, I think, be any question that upon this evidence, in the absence of anything to contradict or displace it, the plaintiff was entitled to recover.

In *Rowe et al. v. McNeil* (13 C. P. 189) the Sheriff's deed recited that, by virtue of a writ of *ven. ex.*, issued out of the Court of Queen's Bench, tested 15th February, 1845, commanding the Sheriff that he should cause to be made of the lands of, &c., he had seized the lands of, &c.,

(the premises in question), and that the premises; (since the seizure by him, made by virtue of the *ven. ex.*), after due notice, were exposed to sale on 26th July, 1845, when, &c. Draper, C. J., in giving judgment against the title claimed under such a deed, says: "The Sheriff asserts that by virtue of the *ven. ex.* he had seized; that since the seizure he had sold; that by virtue of the *ven. ex.* he had conveyed to the highest bidder, *habendum* as fully as the Sheriff ought to grant by force of the Statute and the said writ of *ven. ex.* The Sheriff, in effect, asserts that the power under which he sold is conferred on him by the writ he recites, and one is driven either to reject the name he gives to the writ, and to treat it as a *fi. fa.* according to its recited contents, or to reject the recital of the contents and adhere to the name, as shewing what the writ was under which the Sheriff sold; but in the first case, if we assume that the Sheriff had a *fi. fa.*, then he received it on 15th February, 1845, sold on 26th July, and conveyed on 28th July of the same year, so that he sold within six, instead of not within less than twelve months, from the day the writ was delivered to him."

This case cannot affect that before us, because here we have in the Sheriff's deed every thing recited to have been done under the writ, and in the order and manner required by law to effectuate a sale under execution at law. The matters which are recited in the deed, if proved *dehors* the deed, shew the sale to have been conclusively perfect. The authorities decide that the recital of these matters in the Sheriff's deed is *prima facie* evidence of their existence until the contrary is proved, and that the onus of proving the contrary lies upon the defendants.

The rule must therefore be discharged.

Rule discharged.

FARRELL V. HUNT.

Sale of goods—Principal and agent—Excess of authority—Nonsuit.

Defendant, living in London, and having 5,000 bushels of barley in his elevator there, employed A. & K., brokers in Toronto, to sell the same, giving them a sample. On 8th June, A. & K. wrote defendant, "We have put under offer, subject to your approval, your lot of barley, say 4,000 to 5,000 bushels, cash 50c. net to you in your elevator; answer to be given to-morrow, if accepted." On 9th, defendant answered by letter, giving his approval, which was received on 10th, and on 11th a contract for the sale of the barley to plaintiff was signed by him and A. & K., brokers for defendant, no counter instructions having been received by them. Plaintiff had seen the letters of the 8th and 9th before the contract was signed :

Held. that A. & K.'s authority was to sell on the terms mentioned on 10th, and that defendant was not liable on the contract of 11th.

THIS was an action, tried at Toronto, before the Chief Justice of Ontario, to recover damages for the non-delivery of a quantity of barley. A verdict was rendered in favour of the plaintiff.

It was proved at the trial that a firm of brokers, Aikin & Kirkpatrick, were employed by the defendant to sell barley for him, in the month of June last, and that defendant left a sample with them for that purpose. On 4th June, Aikin & Kirkpatrick wrote to defendant as follows : "We have offered your sample barley on 'Change, and to all the possible buyers, without being able to effect an absolute sale. If here on the spot we could get 55 cents certainly, and perhaps 56 cents. The best offer directly made is 54 cents, but that is below your limit and views. If you could, instead of offering in London, make the offer delivered on track line or in Adamson's store, at say from 55 cents to 56 cents, we think a sale could be effected, at any rate at the inside rate. If you will put it in that shape, let us hear from you by return mail." On 6th June, defendant replied : "I am in receipt of your favour of 4th instant, and note contents. The very best I can do is to allow you to sell my barley at a price that will net me 55 cents for 48 lbs. on the cars in Toronto. If I cannot get this figure, I will carry it over. I would not agree to

put it in store on any account." On the 8th June, Aikin & Kirkpatrick sent the following to defendant: "We have put under offer, subject to your approval, your lot of barley, say 4,000 to 5,000 bushels, at 50 cents net to you in your elevator; answer to be given to-morrow; freight here to be 4 cents. If requirable, could you hold it for a short time for the purchaser, if transaction is completed? Cash, of course, on receipt of your warehouse receipts." On the following day defendant answered: "Your favour of the 8th duly to hand. I notice that you have put under offer 4,000 to 5,000 bushels barley, 50 cents net to me in my elevator; answer to be given to-morrow, if accepted. I can hold it for say ten or fifteen days, free of charge, but would require cash deposit to your order in one of the chartered banks, or cash on warehouse receipts. I would also agree to keep it covered by insurance." On the 11th June Aikin & Kirkpatrick telegraphed, "Have closed your barley; writing particulars." The defendant telegraphed on same day, "Time for your offer having expired *yesterday*, I sold barley this morning before receiving your message." The letter referred to in the telegram was as follows: "We have this morning wired you that we have just completed sale of your barley. We enclose copy of the sale note, which is in exact accordance with your letter of 9th, and we trust will be satisfactory to you. Mr. Farrell pays our commission, 1 cent per bushel. He proposes to visit London on Monday to see the bulk, and to conclude, if possible, through you, some freight arrangement he has in contemplation. He has therefore asked us for a letter of introduction to you, which we have given him." The copy of sale note was: "11th June, 1870. I have purchased, and Messrs. Aikin & Kirkpatrick have sold, for account of Charles Hunt, of London, Ont., from four to five thousand bushels sound barley, same as sample now delivered; terms as follows: price in London, free on cars, fifty cents per bushel; freight to Toronto, four cents per bushel of 48 lbs. If the purchaser desires the shipment to Toronto of any portion, or of the whole lot,

any time before the fall rates for freight are struck on the G. W. R. road, to be held fifteen days free of storage, if desired; satisfactory warehouse receipts to be given, on which cash is to be paid. The seller also agrees to keep the grain insured for fifteen days from completion of this contract; and the said seller agrees to a satisfactory fulfilment of the agreement contained herein, and particularly as to barley being of equal quality to sample." (Signed) "S. W. FARRELL. AIKIN & KIRKPATRICK, Brokers." On the same 11th June, Aikin & Kirkpatrick telegraph: "Purchaser, Farrell, claims delivery fulfilment contract. No counter instructions given." On the 13th June, defendant wrote: "Your telegram of the 11th was received by me at 2, P.M. I at once answered, 'time for your offer having expired yesterday, I sold the barley this morning.' Referring to your letter of the 8th, you say that you had put my barley under offer, subject to my approval; answer to be given to-morrow, if accepted. Now, I find on reading a copy of sale, it was not made until 11th. Not hearing from you, I concluded that no sale was made. Again, it was well understood that you should only sell subject to my approval by wire. I am exceedingly sorry that any misunderstanding should have arisen, but I do not consider myself to blame."

Harrison, Q.C., obtained a rule to set aside the verdict and enter a nonsuit, pursuant to leave reserved, on the ground that the contract sued upon was not the contract of the defendant, and that defendant was not bound by the signature of the brokers thereto.

Lash shewed cause. The brokers had general authority to sell, and could have bound defendant, even though they exceeded their authority, provided plaintiff did not know the extent of that authority. Now, plaintiff saw only the letter of 8th June and defendants answer of 9th, before contract signed, and those letters, with the general authority, support the contract. "We have put under offer," &c., can be read to mean that plaintiff made the

offer to the brokers, and the evidence shewed that in reality plaintiff did make the offer. "Subject to your approval; answer to be given to-morrow, if accepted," means that defendant's answer was to be given to-morrow. "Your approval," and "answer to be given," must mean "your answer stating your approval or non-approval." The letter of the 9th, is an answer stating approval, and though contract not signed till 11th, yet defendant is bound, as no counter instructions were given. If it be doubtful as to the meaning of the words, the writing is to be construed most strongly against the person signing: *Deslandes v. Gregory*, 2 E. & E. 602, 610; *Thorne v. Barwick*, 16 C. P. U. C. 377. [GWYNNE, J.—The authority is to sell "50 cents net to me in my elevator," and the contract is "50 cents free on cars;" was that not an excess of authority?] It was assumed at the trial that "50 cents free on cars" would give defendant "50 cents net in his elevator." His elevator is in London, close to the track of the railway, and the grain would have to be delivered to plaintiff in some way: no question was raised on the trial as to that.

Harrison, Q.C., contra. Brokers have no general authority to sell; factors may have: *Smart v. Sandars*, 3 C. B. 380; *Baines v. Ewing*, L. R. 1 Ex. 320. Plaintiff knew the full extent of the brokers' authority, and that was that the barley was to be sold, "subject to defendant's approval." "We have put under offer" means that the brokers made the offer to plaintiff, and "answer to be given to-morrow, if accepted," means plaintiff's answer to the brokers. Defendant's approval was to have been obtained in any event. Assuming the letter of the 9th to be an approval, it gave the brokers the right to sell (to plaintiff's knowledge) on the 10th at the latest, and the contract not having been made till 11th, is void. The authority, if any, is to sell for "50 cents net" to defendant in his elevator, and the contract is for 50 cents free on cars of G. W. R. This is clearly an excess of authority, and plaintiff cannot recover. He cited *Cooke v. Oxley*, 3 T. R.

653; *Leeming v. Snaith*, 16 Q. B. 275; *Caine v. Horsfall*, 1 Ex. 519; *Cross v. Eglin*, 2 B. & Ad. 106.

GALT, J., delivered the judgment of the Court.

There is no question in this case arising out of the general doctrine of principal and agent, for whatever instructions the agents may have originally received, they were countermanded by the defendant's letter of 6th June; nor can any argument be advanced by the plaintiff founded on the general power which a broker has to make contracts for his principal. To the knowledge of the plaintiff, as shewn by the terms of the agents' offer to him of 8th June, the agents had no authority to bind the defendant, and the plaintiff was expressly told that the proposed contract was to be subject to the defendant's approval. The rights of the parties must therefore be decided on the special circumstances of this case, according to the written evidence above given. It appears, then, that the agents, on the 8th June, made an offer to the plaintiff of the barley in question, subject to defendant's approval, on the terms, "50 cents net to you in your elevator; answer to be given to-morrow; freight here to be 4 cents." We gather from the evidence that this was a verbal offer, as no reference is made to any writing. *Cooke v. Oxley* (3 Term Reports, 653) decides that such an offer, even if accepted by plaintiff, and approved by the defendant, might have been disavowed by either party at any time before it was actually carried out by being reduced to writing and made binding upon both parties. It is, however, unnecessary to enter into any discussion on the subject; our object in referring to it here is to shew that the plaintiff was aware that the agent had no authority to dispose of the barley upon the terms mentioned, but, on the contrary, that the sale must be subject to defendant's approval. It might perhaps have been argued that it was the defendant's approval which was "to be given to-morrow;" but that interpretation was not contended for before us, nor do we think that the offer will bear that

construction. The cases of *Cross v. Eglin* (2 B. & Ad. 106), and *Boden v. French* (10 C. B. 886), shew that it is incumbent on the party relying upon a written agreement, to bring his case within it, otherwise he must fail. The offer, then, as appears to us, was conditional in two respects; first, that it should be approved of by the defendant; and second, that the plaintiff should give his answer the next day. It was approved of by defendant, and his approval communicated to the agents by letter of 9th June. The defendant then had a right to consider that the treaty was at an end if it was not carried out on the 9th, so far as the assent of the plaintiff was necessary. From the evidence given at the trial it was shewn that barley was subject to great variations in price, and it might have been, and no doubt was, of importance to the defendant that the transaction should be closed at once. Be that as it may, the agreement assented to by the defendant, and the authority given to the agents, was to conclude a sale, *not* on the 11th, but on the 10th. It is quite manifest that the plaintiff understood his assent was to be given to the agent on the 9th, and that the bargain was to be *completed* on the 10th. He was examined as a witness on the trial, and states, "I wanted the delay on the 10th to see my banker, to see if I could carry the warehouse receipts or bill of lading. I did see him next day, and had an understanding that he would carry it for me." The case may therefore be briefly summed up as follows: The plaintiff knew that the authority of the agents was limited to a sale on the 10th, and, at all events, he, the plaintiff, was to declare his option on the 9th; he did not do so until the 11th, and any arrangement then made was not covered by the agents' authority. In the view we have taken of the general question, it is unnecessary to consider the terms of the defendant's letter of acceptance, and the subsequent agreement as drawn up and signed by the plaintiff and the agents; but if we were compelled to express an opinion upon the letter, we would hesitate before deciding that "50 cents net to me *in my elevator*"

would authorize an agent to enter into a contract "price in London, *free on cars*, fifty cents per bushel." There must necessarily have been some expense in handling 4,000 or 5,000 bushels, and there was no authority given to the agent to enter into a contract subjecting the defendant to that charge. We think therefore that the rule to enter a nonsuit should be made absolute.

Rule absolute.

MCMILLAN V. THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Exorbitancy in sworn statement of loss—New trial.

Where, in an action on a fire policy, plaintiff, in his statement of loss, swore that his damage amounted to about twelve times the amount actually proved, and for which he obtained a verdict, and the Judge before whom the case was tried was dissatisfied with the finding, the Court, notwithstanding the usual practice as to new trials where the defence charges a criminal offence, granted a new trial, costs to abide the event.

THIS was an action tried before Morrison, J., at the last Fall Assizes for the county of Wellington. The action was on a fire policy for \$2,000 on the following property: \$800 on machinery, &c., in a workshop in the village of Fergus; \$1,000 on stock of boots, &c., and \$200 on household furniture and wearing apparel.

The defence relied upon by the defendants was, "that the detailed statement of the loss of the plaintiff, sworn to by the plaintiff, and by him delivered to the defendants as and for the account of the plaintiff's loss, as in the declaration alleged, was false and fraudulent in this, that the value of the plaintiff's goods insured by the defendants, and destroyed by fire, as in the declaration alleged, was not of the value of \$3,504.71 as in the said detailed statement alleged, but, on the contrary, was of a much smaller value, as the plaintiff, at the time of making the said statement, well knew."

At the trial, the jury found a verdict in favour of the plaintiff for \$500, being \$100 on goods, \$200 on furniture, and \$200 on tools.

Durand obtained a rule to set aside this verdict, on the law and evidence, and the charge of the learned Judge who tried the cause.

To this rule *J. H. Cameron*, Q. C., shewed cause, and contended that, as by the provisions of ch. 23 of 32 & 33 Vic., sec. 5, any person knowingly, wilfully, and corruptly making any declaration required by any Fire, Life, or Marine Insurance Company, claiming to be entitled to any insurance money in respect of any loss of property insured therein, containing any false statement of fact in regard to such loss of property, is declared to be guilty of wilful and corrupt perjury, to grant a new trial in this case would be to subject the plaintiff to a second trial for a criminal offence. This was the only ground urged against the rule.

Durand, contra, referred to *Mason v. The Ag. Mut. Ass. Co. of Can.*, 16 C. P. 493, S. C. 18 C. P. 19; *Lazarre v. Phoenix Ins. Co.*, 8 C. P. 136.

GALT, J.—The statement of loss on the first and last items, made by the plaintiff, and sworn to by him, amounted, as stated in the plea, to \$3,504.71, and the jury have by their verdict found the actual loss to amount to about one-twelfth of that sum.

In the case of *Gould v. British America Assurance Co.* (27 U. C. 473) all the cases in our own Courts on this subject are collected and reviewed, and although there a new trial was refused, the defence being arson, the Court say, "We do not, on the whole, see our way to, as it were, again putting the plaintiff on his trial for this serious offence;" shewing that, in the opinion of the Court, cases might arise in which a new trial might be granted. It is a matter of great delicacy for us to interfere in a case of this description, but the learned Judge reports to us that he was dissatisfied with the verdict, and, as it appears to me

to be entirely against the weight of evidence, I feel that to refuse a new trial in this instance would be to lay down a rule that under no circumstances will a new trial be granted when the defence relied upon is fraud and false swearing. It may be observed that the opposition to this rule, on the part of the plaintiff, shews that, although in making his claim against the Company he swore that his loss was upwards of \$3,500, he is satisfied to receive \$300 in discharge of it. This is very strange conduct on the part of a man who really believed that he had sustained the damage to which he swore.

HAGARTY, C. J.—I agree with the judgment of my brother Galt.

I do not desire that the ordinary practice as to granting new trials in these cases, as laid down in *Gould v. British America Assurance Co.* and *Miller v. Ball*, should be considered as weakened by this decision. It is sufficient to say that there is no rule on the subject so inflexible as to govern a case like this.

It rests with the plaintiff whether his conduct shall be again discussed in Court. He may be sanguine enough to expect that another jury may be found to deal with his case in as large a spirit of charity, as to his estimate of loss and the good faith of his affidavits, as the jury that has recently upheld his honesty of purpose in swearing that his actual loss was twelve times larger than they themselves found it to be.

We think the costs should abide the event.

GWYNNE, J.—I quite concur that in this case the issues should be submitted to another jury, and I do so without intending to depart from anything I have said in *Miller v. Ball* (19 C. P. 447). When a party presents a claim so extortionately disproportionate with any loss by him sustained, the least I can conclude is, that the jury, in rendering their verdict, must have greatly misconceived what the issue they had to determine was; and, in the language of

Martin, B., in *Davies v. Roper* (2 Jur. N. S. 169), I must say that there is danger lest trial by jury should become a great evil, if a verdict like this is to stand, founded upon such evidence as was given in this case, and which the learned Judge who tried the case thinks to be very unsatisfactory.

Rule absolute for new trial, costs to abide event.

HAMILTON ET AL. V. LIGHTBODY.

Ejectment—Secondary evidence of will—Colourable judgment—Conveyance to consuror of.

In ejectment, it having been proved that defendant had the will, on which plaintiffs' title depended, in his possession when it was last seen, that notice to produce it and also a *spa. duces tecum* had been served upon him, and that, not having produced it, the registrar of the county was called, who produced a memorial of it, which was proved by one of the witnesses thereto, who also swore that he saw one McAlinder draw the will, and the latter swore that the memorial was a true copy of the will, which had been executed in his presence and that of another witness, *Held*, that this evidence had been properly admitted.

A deed of the land in question, from the testator to one Pierce, was produced by defendant, which had never been registered, and under which the grantee had never taken possession, the testator having himself retained possession down to his death, and his widow and devisee for life having continued in possession under the will, which she registered, in all a period of 27 years: *Held*, that the title of the plaintiffs, who claimed under the deceased, in remainder, under the will, was not defeated by the deed to Pierce, for that even if that deed was a *bona fide* one, whatever estate was conferred by it, was lost by the 27 years adverse possession retained by the testator and his devisee for life.

A sheriff's deed of the same land to one Burrowes was produced by defendant, from which it appeared that the sheriff under a *fi. fa.* lands against defendant, as executor, and his wife (the widow of the testator), as executrix of the testator, sold to Burrowes, who conveyed to defendant. The judgment upon which the writ issued had been obtained upon a cognovit in an action by one Buell against defendant and his wife, as executor and executrix, for goods sold and delivered by Buell to them, as executor and executrix, and on an account stated; but defendant and his wife were not the executors appointed by the will, of which defendant was aware, as he had the will in his possession: *Held*, that this deed could not defeat the plaintiffs' right to recover.

THIS was an action of ejectment to recover possession of N. E. half of lot No. 1 in the second concession of Beckwith.

The plaintiffs, in their notice of title, claimed through William Hamilton, devisee of one George Hamilton.

Defendant, besides denying the plaintiffs' title, claimed by bargain and sale from one Burrowes. In the course of the plaintiffs' case it was necessary to give evidence of George Hamilton's will. It appeared that George Hamilton purchased the lot in question in 1827, and that he lived upon it until his death, which took place in 1846. One McAlinder, who drew the will, and who was also one of the witnesses to it, was called. He swore to his having drawn it, to its having been executed by George Hamilton in the presence of the witness and of another subscribing witness, named Michael Roche, since deceased. It was proved that about three or four years before the defendant had the will in his possession. Notice to produce was served upon him, and he was also subpœnaed to produce it. He swore that he had married the widow of George Hamilton. He did not produce the will, but the Registrar of the county was called and produced a verbatim memorial of the will, which was executed for registration by the widow of the testator in the presence of Michael Roche, one of the witnesses to the will, and one David Bell.

Bell was called and swore to the execution of the memorial: he also swore that he knew McAlinder drew the will, and the latter swore that the memorial produced was a true copy of it. The learned Chief Justice of this Court, upon this evidence, received the memorial copy as evidence of the will, as the original was proved to have been seen three or four years ago in the possession of defendant, who, upon notice, had not produced it or accounted for his not doing so.

On the defence the defendant called the son of one Thomas Pierce, who stated that he was subscribing witness to a deed produced by him out of his mother's possession. The deed purported to be a bargain and sale of the land in question by George Hamilton to one Thomas Pierce for the expressed consideration of £55. It was dated 31st July, 1843. Witness proved that the grantee, Thomas Pierce,

had never been in possession under the deed, and further, that it was not registered. Witness did not know what the deed was executed for, nor had he ever seen it from the time of its execution until the Saturday previous to the trial, when his mother shewed it to him. It was produced in consequence of the defendant having informed his attorney of its existence. The defendant then proved a deed executed by the Sheriff of the County of Renfrew to James Burrowes, whereby the Sheriff, in virtue of a writ of *fieri facias* against the lands and tenements of George Hamilton, in the hands of William Lightbody, (the defendant) executor, and Jane Lightbody (the widow of George Hamilton, then the wife of the defendant) executrix, of the last will and testament of George Hamilton, deceased, to be administered, sold the land in question to Burrowes. This deed was dated 30th day of April, 1853. The defendant then produced a deed to himself from James Burrowes, dated 4th September, 1854. He also put in a copy of the writ of *fieri facias* and an exemplification of the judgment upon which it issued.

The judgment appeared to have been obtained upon a *cognovit actionem*, in an action brought by one William Oscar Buell, who in his declaration declared that the defendant William Lightbody, as executor, and Jane Lightbody, as executrix, of the last will and testament of George Hamilton, deceased, were indebted to Buell in £100, for goods sold and delivered by the plaintiff to the defendants, as executor and executrix as aforesaid, at their request, and for money found to be due from the defendants, as executor and executrix aforesaid, to the plaintiff, upon an account stated between them.

The learned Chief Justice, before whom the case was tried without a jury, rendered a verdict for the plaintiffs.

In Michaelmas Term *Harrison*, Q.C., moved to set aside this verdict, and to enter a nonsuit or verdict for the defendant.

S. Richards, Q.C., shewed cause, citing *Tenny v. Jones*, 10 Bing. 75; *Eades v. Maxwell*, 17 U. C. 173.

Harrison, Q. C., contra, contended, 1st. That the evidence of the will was improperly received. 2nd. That the deed to Thomas Pierce shewed the title out of George Hamilton; and 3rd. That the sheriff's sale to Burrowes, and by Burrowes to defendant, shewed George Hamilton's title, whatever he had at the time of his death, in the defendant. He cited *Burke v. Battle*, 17 C. P. 478; *McGee v. McLaughlin*, 23 U. C. 90; *Wilson v. Baird*, 19 C. P. 98; *Doe McBernie v. Lundy*, 1 U. C. 186; *Tay. Ev.* 118.

GWYNNE, J., delivered the judgment of the Court.

We see no reason for disturbing the verdict. The secondary evidence of the will was, we think, properly received, it having been proved and not disputed that the defendant had had the will in his possession when it was last seen. The judgment, subsequently produced by the defendant, wherein it appears that he, in order to perfect that judgment, assumed to act as executor of the last will and testament of George Hamilton, deceased, subjected him to account for the will; and as he failed to produce it, secondary evidence of it was admissible. Then the secondary evidence of it is the evidence of the person who drew the original and witnessed it, who swears that the memorial copy is a true copy. The will so proved shews that the deceased, George Hamilton, shortly before his death, and when in the possession of the land in question, and on the 26th June, 1846, devised the land in question to his wife, Jane Hamilton, during her lifetime; "and after her time to fall to William Hamilton, my brother, or his heir; and all my cattle and moveable property leaving to my wife, Jane Hamilton, on condition of her paying all my lawful debts." Here follow the signatures of the testator and the witnesses, and at the foot are the words, "leaving Archibald McGillis and John Beamis as executors;" at the foot of which are the signatures, Archibald x McGillis, John x Beamis; but this portion is not signed by testator. This will was registered in the county registry office by the tenant for life, the testator's widow, on the 6th day

of April, 1847. The will being sufficiently proved, the plaintiffs were *primâ facie* entitled to recover, and of that right the deed produced, dated the 31st day of July, 1843, cannot deprive them; for if that was a *bonâ fide* deed for the purpose it purports to be, which seems questionable, when we see that it was never acted upon nor registered, whatever estate Pierce, the grantee, acquired thereby, he has lost by the twenty-seven years of adverse possession retained by the grantor and his devisee, the tenant for life, whose possession we must attribute to that title which she acquired under the will, which she registered in 1847. So neither can the title under the sheriff's deed which has been set up by the defendant divest the plaintiffs of their right to recover. There seems strong ground for suspecting that judgment to have been altogether a fraudulent contrivance of the defendant to get the title to this land in himself, a design conceived no doubt after he had married the widow, tenant for life; for, although possessed of the will of George Hamilton, whereby it appeared that if any persons were named executors, they were McGillis and Beamis. Instead of procuring the will to be proved and probate thereof obtained, or letters of administration with the will annexed, he assumes to act as executor himself, and we may assume that he procured his wife to act as executrix, and both combine to confess judgment for about £33 in an action brought against them, as executor and executrix, for goods, sold to them, as executor and executrix as aforesaid, at their request, and upon an account stated with them as such, although there is no debt stated or shewn of the deceased George Hamilton in respect of which they could, if executor and executrix, state an account, and although George Hamilton had devised all his chattel and movable property to his wife Jane on condition of her paying all his lawful debts.

We need not, however, speculate upon the object of the defendant in confessing this judgment: fortunately we are relieved from that enquiry by reason of the futility of the proceeding. The will shews that William Lightbody and

his wife Jane, formerly the wife of the deceased George Hamilton, never were executors of his will: whether or not McGillis and Beamis ever were is a matter of no importance, for no judgment has been recovered against them as such. Whether the plaintiff (Buell) in the action could ever have established a right to recover against Lightbody and his wife, if they had not confessed the action, we are not informed by the evidence. Judging from the cause of action stated in the declaration we should assume that he could not. If, however, he could have recovered against them, it could only have been by reason of his being able to shew that they were executors *de son tort*. By assuming to be executor and executrix, when they knew they were not, and in such false character executing the confession of judgment, they cannot claim to be acting otherwise than as executors *de son tort*. The effect then is, that the defendant, while claiming the benefit of the sheriff's deed to Burrowes, shews that the writ of *fieri facias*, upon which that sale took place, was issued, not upon a judgment obtained against rightful executors, but against persons who falsely assumed to be executors, and who in such assumed character confessed a judgment in respect of a debt due by themselves. *McDade dem O'Connor v. Daffoe* (15 U. C. 386), *Wrathwell v. Bates* (15 U. C. 391), and *Graham v. Nelson* (6 C. P. 280), are conclusive authorities that the sale of a testator's lands under an execution issued upon a judgment so obtained is void. The defendant has in fact shewn that nothing passed by the plaintiffs' deed to Burrowes, but that it always was and is null and void. Some affidavits have been filed by the defendant upon moving the rule, but they throw no light upon the *bona fides* of the deed to Pierce, for the purpose of doing which they seem to have been designed; nor if they did, can they displace the effect of *Pierce*, the grantee, never having in fact disturbed the possession of George Hamilton, the testator, nor his devisee. If the *bona fides* of this deed was a matter of importance now, some explanation would be required of the fact of the grantee having, in 1853, suffered

the land to be sold as Hamilton's upon the judgment obtained against Lightbody and his wife.

The rule will be discharged and the verdict for the plaintiffs will stand.

'Rule discharged.

PATTERSON v. IRWIN.

Mining leases—Verbal agreement for sale of—Defect in title—Waiver.

Plaintiff, having verbally agreed with defendant for the purchase from him of an interest in certain mining leases, discovered, within a short time after a payment made by him on account, that there was some defect in the title, but he never repudiated the bargain until just before action brought; on the contrary, continued to act as if the bargain was valid: *Held*, that he could not recover back the money paid by him, and that the agreement's being a verbal one could not avail him, defendant having sworn that he was ready and willing to carry out his engagement and convey, as agreed upon.

THIS was an action, tried before Galt, J., at Belleville, brought to recover the sum of \$1,000, paid and advanced by the defendant as part payment of a purchase of an interest in certain mining leases held by the defendant.

The declaration contained only the common money counts, and the pleas were payment and never indebted. The evidence given at the trial is sufficiently stated in the judgment of the Court.

At the close of the case the Judge, before whom the case was tried without a jury, found a verdict in favour of the defendant, reserving leave to the plaintiff to move to enter a verdict in his favour.

Wallbridge, Q. C., obtained a rule *nisi* accordingly, to which *Jellett* shewed cause, citing *Hoskins v. Mitcheson*, 14 U. C. 551, and *Wallbridge* supported the rule.

GALT, J., delivered the judgment of the Court,

From the evidence in this case it appears that in March, 1869, the plaintiff made a verbal agreement with the defendant to purchase from him an interest in certain mining leases for the sum of \$5,000, and within a few days after the bargain paid him \$1,000 on account of the purchase money. Within a short time after this payment the plaintiff ascertained that the title to one of the leases was defective, and spoke to the defendant about it; and not very long after he heard that two others of the leases were in the same position. The plaintiff states that as regards one of these he spoke to defendant, but this the defendant denies; and as respects the other, the plaintiff admits that he did not speak to the defendant, *as he had made up his mind* that the original contract could not be carried out. It is quite evident, however, that he never notified the defendant of this, but, on the contrary, he admits that there was a company got up to work a portion of the land leased to defendant, and that he was one of the directors. He admits also that he did not take any step to recover the money, because he was in hopes that he would from the sale of the other lands and get the money back without litigation. On the argument of the rule Mr. Wallbridge relied on two points; 1st, that in consequence of the title to one or two of the leases being defective, the plaintiff was entitled to treat the bargain as not binding upon him; and 2nd, that, as there was no written agreement, he had at any time a right to consider the bargain as null, and to recover the money paid on account, as money had and received by defendant to the use of the plaintiff.

As regards the first point. It is quite manifest that the plaintiff, after full knowledge of the defect in the leases complained of, never repudiated the bargain until just before the commencement of this suit, but, on the contrary, continued to act as if the bargain was valid. The case of *Campbell v. Fleming* (1 Ad. & El. p. 40) is express to shew that even in a case of fraudulent misrepresentation (of which there is no evidence in the case before us), if a

purchaser, after the knowledge that a fraud had been perpetrated upon him, continues to deal with the property purchased, he cannot afterwards repudiate the bargain. This case, which also had reference to mining transactions, was very much stronger in favour of the plaintiff than the one now before us.

As regards the second point. The defendant swears positively that he was ready and willing, and still is ready and willing, to carry out his engagement and convey the interest agreed upon to the plaintiff. The case of *Hoskins v. Mitcheson* (14 U. C. 551) is a clear authority against the plaintiff's contention in this suit.

Rule discharged.

FENNELL V. MCGUIRE.

Continuing guarantee—Death of coguarantor—Liability of survivor.

Defendant and another addressed to plaintiff a joint note in these words: "In consideration of your supplying to Mr. John McGuire supplies of, &c., out of your store for his business, we agree to become responsible for the payment of \$200 for such goods, and guarantee the payment of that amount, whether the same be due on note or book account, to you for said hardware, iron, &c.": *Held*, a continuing guarantee.

Held, also, following *Bradbury v. Morgan*, 1 H. & C. 249, that the death of one of the guarantors did not extinguish the guarantee, it not appearing that any notice had been given to plaintiff on behalf of the estate of deceased, or that the survivor supposed he was released by the death of the other, but, on the contrary, acknowledged his liability as still subsisting, and promised to settle.

THIS was an action on a guarantee, tried before Morrison, J., at Berlin, without a jury. The guarantee was as follows:—

"BERLIN, August 1, 1865.

"MR. JOHN FENNELL,

"Hardware Merchant, Berlin.

"DEAR SIR,—In consideration of your supplying to Mr. John McGuire, carriage maker, Berlin, supplies of hardware, iron, &c., out of your store for his business, we agree

to become responsible to you for the payment of two hundred dollars (\$200) for such goods, and guarantee the payment of that amount, whether the same be due on note or book account to you for said hardware, iron, &c.

"Yours, &c.,

"JAMES MCGUIRE,

"HUGH MCGUIRE."

At the trial three objections to the plaintiff's recovery were taken :

1st. That the guarantee was not a continuing guarantee.

2nd. That the goods were furnished, not to John McGuire alone, but to a partnership of which he was a member.

3rd. That the guarantee was at an end owing to the death of James McGuire, all goods previously delivered having been paid for.

At the close of the case the learned Judge entered a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict in his favour, if the Court should be of opinion that he should have had a verdict on the whole case, the Court to be at liberty to draw inferences.

Thomas Moss obtained a rule *nisi* accordingly, to which *M. C. Cameron* shewed cause, citing *Shaw v. Vandusen*, 5 U. C. 353; *Davies v. Wilkinson*, 10 A. & E. 98.

Moss, contra, cited *Wood v. Priestner*, L. R. 2 Ex. 66; *Kastner v. Winstanley*, 20 C. P. 101; *Fisher Dig.*, new ed.; *Shaw v. Vandusen*, *supra*.

HAGARTY, C. J., delivered the judgment of the court.

I think this is a continuing guarantee. On its face it evidently contemplates that John McGuire is to get supplies of hardware, &c., from plaintiff, and that the guarantors would be responsible to the named limit, "whether the same be due on note or book account." See *Heffield v. Meadows* (L. R. 4 C. P. 595); *Wood v. Priestner* (L. R. 2 Ex. 66, and in Error, *Ib.* 282).

I can see no reason, on the evidence, for deciding against defendant's liability on any of the doubtful evidence about Zeigler's alleged connexion with John McGuire. It is not suggested that the present debtors knew anything about

Zeigler, and John McGuire swears that about ten months after the guarantee was given all connexion between them ceased, and while connected he was a silent partner, and the business carried on in McGuire's name only. The goods were supplied to McGuire for several years, and no question seemed to have been ever raised by either of the brothers who signed the guarantee. If we assume that the present defendant knew of his brother's peculiar relation with Zeigler, as is most probable, we may be sure that he was in no way deceived, but gave his guarantee, and always acknowledged his liability thereon.

I think, without infringing any principle of law, we may decline to allow this evidence, contradictory and unsatisfactory as it is, about Zeigler, to affect this case.

The last objection is that James McGuire's death put an end to the guarantee.

The dealings seem to have ended about August, 1869, and it is said that James died about two years before the trial, which would be about October, 1868, or ten months before the dealings ceased.

It does not appear when plaintiff heard of his death. The claim now made is for goods furnished between 7th January and August, 1869.

In *Bradbury v. Morgan* (1 H. & C. 249) it was held that a guarantee was not a bare authority, but a contract, and therefore the executor of guarantor was responsible for goods supplied after his death, at all events until notice is given by executor to put an end to the contract. Bramwell, B., says, "Very likely a tradesman, who would not trust in the first instance without a guarantee, would not deliver any goods after the death of the guarantor; but however that may be, the executor must give some timely notice in order to put an end to the contract." The Court held that death did not *ipso facto* determine it, and that the law laid down in *Williams on Executors* (5th ed. 1859) is inaccurately stated.

Offord v. Davies (12 C. B. N. S. 748), decided the same year, held that a guarantee could be revoked as to future dealings by the guarantor.

Both these cases are commented on in *Grange v. Mills et al.* in this Court (19 C. P. 398).

In the present case there is no proof of any notice being given by any one on behalf of deceased's estate, and there is the further difficulty that the surviving guarantor, the obligation being joint only, makes no objection on his part, but, on the contrary, letters are put in from him to plaintiff, after John McGuire's insolvency, admitting his liability, promising to settle, and urging plaintiff to make his deceased brother's representatives pay their share of the claim.

In one of his letters (December, 1869,) defendant says, after urging him to apply to the widow, who had administered : "I would (*sic*) you to write and request a settlement, and if you can get his note you are as safe as you need to be; then I will come and square up satisfactorily with you. Of course I know it is at your option to come on either; it would not be right to shove all on me. Divide the amount equal; demand her part and I will pay mine."

It thus clearly appears that the surviving joint contractor in no way supposed that the death of the other relieved him from further liability.

No authority has been cited to us in favour of the objections, and I think, especially with the decision of *Bradbury v. Morgan* before us, we cannot give effect to it.

I think the rule should be absolute to enter verdict for the plaintiff.

Rule absolute to enter verdict for plaintiff.

BLAKELY V. HALL.

Insolvent Act of 1869—Appointment of official assignee—Right of assignee to goods seized by sheriff under fi. fa.—Pleading.

The County Judge of a County, in which no Board of Trade existed, appointed an official assignee for the County within three months after the Insolvent Act of 1869 came into force: *Held*, that such appointment was valid under section 31 of the Act, although a Board of Trade existed in an adjoining County, but had not appointed an assignee.

Quære, can a Board of Trade appoint an official assignee under section 31, after the lapse of three months from the time when the Act came into force?

When an assignment is made under the Insolvent Act of 1869, it is the duty of a sheriff, who has seized goods under a *fi. fa.* against the insolvent, to surrender the goods to the assignee, leaving the execution plaintiff to assert his privilege for costs, if any he has, in the proceedings in insolvency.

In pleading to a declaration, charging a sheriff with neglecting to make the money under a *fi. fa.*, an allegation that the execution debtor made an assignment under the Insolvent Act of 1869 to an official assignee for the County, appointed under the Act by the County Judge, and that the sheriff had surrendered the goods to the assignee, is sufficient without alleging that no Board of Trade existed in the County, or in an adjacent County, or that no assignee had been appointed by a Board of Trade; and it would be sufficient to aver that the assignment had been made to an official assignee for the County, without shewing how the assignee was appointed.

THIS was an action against the defendant in his character of sheriff, the first count of the declaration alleging the recovery of a judgment in the County Court of Peterborough by the plaintiff against Strickland & Brothers, and the issue of a *fi. fa.* goods on same day, and delivery to defendant to be executed; with averment, that there were goods in the defendant's bailiwick, of which he had notice, but did not levy, &c.

The second count was for a false return to the writ, setting out same judgment and *fi. fa.* as in first count, with delivery to defendant as aforesaid, and levy by him thereon, and charging that defendant returned thereto, that after levy Strickland & Brothers became insolvent and executed a voluntary assignment to one Hall, official assignee, who notified defendant to abandon, which he did, whereby, &c.

Plea,—Alleging insolvency of Strickland and Brothers, after delivery of writ to defendant, and voluntary assign-

ment under Insolvent Act of 1869 to Hall, who had theretofore acted as official assignee for said County under the appointment of the Judge of the County Court, setting out the appointment, &c.

Replication,—That, except by appointment of the County Judge, Hall was not official assignee, and that from the time of the passing of the Insolvent Act of 1869, and from thence hitherto, there was a Board of Trade in an adjacent County.

Demurrer to plea:—1. Under Insolvent Act of 1869, the duty of nominating official assignees devolved upon Boards of Trade or the councils thereof, and only in exceptional circumstances was the right of appointment given to County Judges. As the appointment in the plea mentioned was made by the County Judge, the foundation of his right or jurisdiction to make the appointment should be explained in the plea by an allegation that no Board of Trade was in existence in said County of Peterborough, or in any County adjacent thereto.

2. Said plea did not answer declaration, inasmuch as from all that appeared thereby, defendant should and might have made the money before the execution of the assignment in insolvency.

3. Said plea assumed to answer the entire cause of action, yet it appeared therefrom that plaintiff was entitled to succeed as to a portion thereof, namely, to the extent of his costs of said judgment.

4. Not alleged that Hall was an official assignee in and for the County of Peterborough, at the time of the assignment, by virtue of said appointment or otherwise.

Demurrer to replication:—1. Defendant was justified in recognizing Hall as official assignee, the office being one of a public nature, and his acting in that capacity being sufficient evidence of his due appointment to justify defendant in treating him as such.

2. Defendant was justified in recognizing Hall as official assignee, he having been appointed as in said plea mentioned.

3. Said Hall having been appointed official assignee, as in plea mentioned, defendant was not bound to enquire into the regularity of appointment, or whether a Board of Trade existed in an adjacent County.

H. Cameron, for the plaintiff, cited *Broom's Legal Maxims*, 729; *Allen v. Carter*, L. R. 5 C. P. 414; *Stockdale v. Hansard*, 11 A. & E. 253.

[The Chief Justice referred to *Ovens v. Taylor*, 19 C. P. 49.]

C. S. Patterson, contra, cited *The Lancaster &c., R. W. Co. v. Heaton*, 8 E. & B. 952; *Kelly v. Morray*, L. R. 1 C. P. 667; *McWhirter v. Learmouth*, 18 C. P. 136; *Rex. v. Verelst*, 3 Camp. 432; *McGache v. Alston*, 2 M. & W. 206; *Converse v. Michie*, 16 C. P. 167; *Re Heyden*, 29 U. C. R. 262.

The Statutes relied on are referred to in the judgment.

GWYNNE, J.—The questions presented to us upon these pleadings arise wholly under the Insolvent Act of 1869, 32 & 33 Vic. ch. 16. By the 31st section of that Act, it is enacted that “The Board of Trade at any place, or the council thereof, shall, within three months from the time at which this Act shall come into force, name any number of persons within the County in which such Board of Trade exists, or within any County adjacent thereto, in which there is no Board of Trade, to wit, at least one official assignee for each of such Counties, to be official assignees for the purposes of this Act, and a copy of the resolution naming such persons, certified by the Secretary of the Board, shall be transmitted to the Clerk of the Court in the County within which such assignees are resident respectively, and such copy shall be *primâ facie* evidence of the appointment, *but such nomination may be made by the Judge* in any County wherein or adjacent to which no Board of Trade exists, and also in such County wherein or adjacent to which a Board of Trade exists, but in which the Board of Trade shall have failed to make such nomina-

tion during the delay aforesaid, and in that case the Judge shall certify such nomination under his hand, and shall file such certificate in the office of the Court over which he presides."

The demurrers raise two points for our decision; 1st, whether the defendant's pleas are sufficient in law; and 2nd, assuming them to be good, whether the replication thereto is good in law. Two objections are taken to the pleas; firstly, that they do not shew that the Judge of the County Court of the County of Peterborough had jurisdiction to appoint the official assignee in the pleas mentioned; and 2nd, that the pleas afford no answer, at any rate, quoad the plaintiff's costs in the action in which he recovered judgment.

As to the first objection, it appears to me that it would have been quite sufficient for the defendant to have pleaded that the insolvent judgment debtor made the assignment set forth in the plea to Hall, being official assignee of the County of Peterborough, without saying how he was appointed. Adding, that he was appointed by the Judge cannot vitiate, for the Judge having by the Act, in certain events, undoubted jurisdiction to appoint, and it being averred that the appointment was made by the Judge in pursuance of the Act, it will be presumed *omnia rite esse acta*.

Then, as to the objection that the pleas afford no answer quoad the plaintiff's costs. By the 59th section of the Act it is provided that no lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of *any judgment debt*, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon, or seizing under such writ, the effects or estate of the insolvent, if, before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor shall have been assigned to an interim assignee, or shall have been placed in compulsory liquidation under this Act; *but* this provision shall not affect any lien or privilege acquired before

the passing of this Act, or any privilege for costs which the plaintiff *possesses* under the law of the Province in which such writ shall have issued, by reason of such issue, delivery, levy, or seizure. Now, in the case before us, the judgment not having been recovered until after the passing of the Act, the plaintiff had acquired no lien or privilege before the passing of the Act. I do not stop to enquire whether or not the plaintiff *possesses* any, and, if any, what privilege for costs, which form part of the judgment debt, when all lien and privilege in respect of that judgment debt is taken away by the clause; nor whether there exists in this case any privilege for costs accrued subsequent to the judgment, by reason of the issue and delivery of a *fiery facias* to the sheriff, or of a levy or seizure thereunder. Whatever privilege, if any, does exist for *any* costs, I am of opinion it constitutes a claim which by the Act must be made in the proceedings in insolvency. The 50th section of the Act provides that "*all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in, or to any effects or property in the hands, possession, or custody of the assignee, may be obtained by an order of the Judge, on summary petition, in vacation, or of the Court, on a rule in Term, and not by any suit, attachment, opposition seizure, or other proceeding of any kind whatever.*" The Act vests in the assignee all the estate and effects of the insolvent, whether under seizure or not, and the intent is that such estate and effects should be wholly administered by the Court in the insolvency proceedings, reserving to the plaintiff his privilege for costs, if any he has, as a privileged claim to be asserted in the proceedings in insolvency. I am of opinion, therefore, that the pleas are not bad for either of the objections taken, and that judgment must be given for the defendant upon the demurrer to them.

The answer which the replication to these pleas offers in substance is, that the nomination by the judge in the pleas, and the return endorsed on the writ of *fiery facias* mentioned, is dated and was made on the 25th day of October,

1869 ; and that except under that nomination, from thence hitherto, the said James Aldboro Hall had not been nominated, appointed, authorized, or empowered to act as an official assignee in the County of Peterborough, and that before and at the time of the coming into force of 32 & 33 Vic. ch. 16, and from thence for more than three months thereafter, there existed and continued to exist a Board of Trade in a County adjacent to the said County of Peterborough.

The contention raised by this replication is, that on the 25th October, 1869, when the Judge of the County of Peterborough nominated Mr. Hall as official assignee of that County, he had no jurisdiction to do so, for that there was a Board of Trade then, and there still is, in a County adjacent to the County of Peterborough, and that three months had not elapsed between the day of the coming of the Act into force and the said 25th October.

This replication is demurred to for the reasons that, as is contended, the sheriff was bound to recognize, or was justified in recognizing, the appointment by the Judge as a judicial act, and that the person so appointed having acted under the appointment, the sheriff was justified in surrendering to him the effects seized ; that it was no part of the duty of the sheriff to question or enquire into the regularity or validity of the appointment, or to enquire whether or not a Board of Trade existed in a County adjacent to the County of Peterborough.

We must judicially notice that the Act did not come into force until the 1st of September, 1869, and that therefore three months had not elapsed, from the time of the Act coming into force, at the time of the nomination by the Judge on the 25th October.

It may be a very serious matter, not only as affects this case, but also many others, if the nomination by the Judge, called in question in this case, is void, for we were informed during the argument that neither of the Boards of Trade, which were said to exist in two several counties adjoining the County of Peterborough, has since the passing of the

Act appointed an official assignee for the County of Peterborough, and that the only person who is acting as such is this Mr. Hall, and he under the appointment of the 25th October, 1869.

Notwithstanding anything that appears, it may be true that Mr. Hall, immediately upon the execution to him of the deed of assignment by the insolvent judgment debtors, called a meeting of the creditors of the insolvents in the manner required by the 2nd section; and that such meeting was held within the three weeks from the making of the deed of assignment; and that the plaintiff, being duly notified thereof, attended thereat; and that he presided at the meeting as chairman; and that at such meeting some other person was appointed assignee by the creditor; and that within twenty-four hours thereafter Mr. Hall, as interim assignee, executed the deed of transfer required by the 6th and 8th sections; and that authentic copies of the deeds of assignment and transfer, together with the list of creditors, including therein the plaintiff, have been deposited in the County Court, as required by the 11th section; and that such deeds have been registered under the 12th section; or that Mr. Hall himself was elected assignee by the creditors, and that his appointment was signed by the plaintiff as chairman of the meeting, and by one or more creditors, as required by the 9th section; and that the instrument of appointment is filed in the Court, and is now a record thereof; and that a copy thereof and of the deed of assignment is registered; and that all these things occurred before the commencement of this action. Nay, it might be true that the estate of the insolvents has been sold and ratably distributed among their creditors, including the plaintiff. If, notwithstanding such a state of things, all that had been done should prove to be void, by reason of the invalidity of the appointment of the official assignee, and if a person, in the position I have assumed the plaintiff to be in, could revert to his claim against the sheriff and recover against him for not contesting the validity of the appointment, and for surrendering the

estate which he had seized in execution to the assignee, we cannot too seriously estimate the gravity of the position; nor can we, in my judgment, too minutely scrutinize the Act with the view, if possible, of arriving at a construction which would have the effect of averting consequences so calamitous.

The 5th section of the Act declares that "no neglect or irregularity in any of the proceedings antecedent to the appointment of an assignee" (that I take to be of creditors' assignees) "shall vitiate such appointment, whether it be made under a voluntary assignment or in compulsory liquidation." These words, "neglect" and "irregularity," would seem to point to acts or defaults committed *in the proceedings in insolvency* in a particular case, and not to anything invalid in the appointment of an official assignee, which is not a proceeding in any case, but is an act antecedent to all proceedings in insolvency. If the appointment of a person acting in the character of official assignee be *void*, it would seem that all proceedings based upon the assumption of its validity would be void also; consequently, that nothing passed to such a person by a voluntary assignment executed to him. By the 10th section the creditors' assignee acquires only the same rights in and to the insolvents' estate and effects as was previously held by the interim assignee; but if the appointment of the person assuming to act as interim assignee be void, could anything vest in him which could pass through him by transfer to the creditors' assignee? If not, then the consequence may be that the administration of an estate in insolvency by a creditor's assignee might be null and void, and might be called in question at any time, unless the 144th section would in such a case afford protection after the expiration of twelve months from the appointment of the creditors' assignee. But it may be questioned whether the words in that section, "but after the expiration of the said period, as to all persons not previously contesting the same, and until set aside by the decision of a Court of Law or Equity, upon a previous contestation thereof, such

appointment and the proceedings preliminary thereto, shall be conclusively presumed to be valid," would be sufficient to cure a defect such as is insisted exists here, of a voluntary assignment being made to a person having no valid appointment as official assignee. It may be urged that the appointment of an official assignee is not a "proceeding preliminary" to the appointment of a creditor's assignee in the sense in which the words are used in the 144th section, but that these words relate to *proceedings* in insolvency in each particular case; and it may be urged that there is nothing in the Act which can make valid and sufficient anything which has its foundation in a void deed, which it is contended, a voluntary assignment, made to a person having no valid appointment as official assignee, is, and which, as is contended, can have no greater effect than to constitute an act of insolvency, subjecting the grantor to compulsory liquidation under the 13th sec. sub-sec. *i*.

The structure of that portion of the clause which has given rise to the question appearing on these pleadings is so confused that it seems to be impossible, unless the words causing the confusion be rejected, or, if retained, unless many words be added and a complete reconstruction be adopted, to frame a grammatical and intelligible sentence. The words of the clause are, "but such nomination may be made by the Judge in any county wherein or adjacent to which no Board of Trade exists, and also in such County wherein or adjacent to which a board of trade exists, but in which the Board of Trade shall have failed to make such nomination during the delay aforesaid." If the word "*or*" in this sentence is to be taken literally, as it appears in the sentence, then it would seem that in the County in question, namely, the County of Peterborough, the right of the Judge to nominate an interim assignee is concurrent with that of the Boards of Trade which exist in adjacent Counties. The clause would then read thus, "but such nomination may be made by the Judge in any County wherein no Board of Trade exists." This is one event in which the Judge may appoint. "*Or* in any County adjacent to which

no Board of Trade exists." The first branch of this sentence so read would be perfect, grammatical, and sensible; but what is meant by the words, "or in any County adjacent to which no Board of Trade exists?" If A. be a County, having a Board of Trade, and B. an adjacent County not having one, then A. would be a County adjacent to which *is a County wherein* no Board of Trade exists. Then A. literally, if there be any meaning in the expression, "adjacent to which no Board of Trade exists," would be the county which would answer the description; but A. itself, having a Board of Trade, cannot be the County meant; so neither can B., for it not having a Board of Trade, is already covered by the previous part of the sentence, "any County wherein no Board of Trade exists." If it be suggested that the word "*or*" may be read "*and*," the sentence appears to be involved in greater obscurity. It would then read thus, "but such nomination may be made by the Judge in any County wherein *and* adjacent to which no Board of Trade exists, *and also* in such County wherein *and* adjacent to which a Board of Trade exists, but *in which the* Board of Trade shall have failed to make such nomination during the delay aforesaid." The County indicated in the first branch of the sentence so constructed would be a single County, having no Board of Trade within itself, nor a County adjoining it which had one, supplying, as seems necessary to make the sentence at all sensible, the words "*in a County*" before the words "*adjacent to which*;" but the County indicated in the second branch of the sentence requires to be a single County wherein *and* adjacent to which, supplying again the words, "*in a County*" before the words "adjacent to which," thus, "wherein *and* in a County adjacent to which a Board of Trade exists," *in which* County the Board of Trade shall have failed to make such nomination during the delay aforesaid;" a County, in fact, which not only has a Board of Trade within itself, but which has another County adjoining it which has a Board of Trade also. This clearly was not and could not have been the intention of the Legislature. We were told, in

argument, that there are two Counties, viz., Northumberland and Hastings, each of which has within itself a Board of Trade, and each abuts upon the County of Peterborough. There are therefore here two Counties which, by the preceding part of the 31st clause, have concurrent jurisdiction to appoint official assignees in the County of Peterborough. In order to give the sentence under consideration the interpretation contended for by the plaintiff it must be wholly reconstructed thus: "but such nomination may be made by the Judge in any County wherein no Board of Trade exists, *and* adjacent to which there is not any County wherein a Board of Trade does exist; *and also* in any County wherein a Board of Trade does exist, or in any County adjacent thereto wherein no Board of Trade exists, if the Board of Trade in the County, wherein the Board does exist, shall have failed to make such nomination therein, or in *such* County adjacent thereto during the delay aforesaid." If we reject the words, "or adjacent to which," as ungrammatical and insensible in the manner in which they are used, then we shall have a sentence perfect, grammatical and sensible, which will read thus: "but such nomination may be made by the Judge in any County wherein no Board of Trade exists, and also in such County wherein a Board of Trade exists, but in which the Board of Trade shall have failed to make such nomination during the delay aforesaid."

In the sentence so constructed, the contrast between the County, wherein no Board exists, with that wherein a board does exist is sustained, and the failure to appoint by a Board of Trade, being made a condition precedent to the invoking the jurisdiction of the Judge to appoint in the County having a Board of Trade, is confined to that County. The nomination is to be made by the Judge of the County wherein no Board of Trade exists for *his* County, and by the Judge of the County wherein a Board of Trade exists for *his* County in which the Board of Trade shall have failed, &c., &c. In the former case the Judge of the County wherein no Board of Trade exists

would have concurrent jurisdiction with the Boards of Trade in adjoining Counties; in the latter, the Judge's jurisdiction arises upon default of the Board of Trade which exists in the County.

It is a maxim founded upon the greatest authority that, in construing Acts of Parliament or Deeds, we have no power to alter the words, or to insert words which are not in the statute or deed: *Smith v. Packhurst* (3 Atk. 136). I find it impossible to give to the clause as it stands, or indeed, without wholly reconstructing it and introducing many words not used, the construction contended for by the plaintiff. I have no authority so to reconstruct the clause.

It is a canon of construction also that words are to be taken in their ordinary and grammatical sense; but the words, "or adjacent to which," in the manner in which they are used in the clause are, in my judgment, incapable of receiving any grammatical and sensible construction, and I find a clause perfect, grammatical and sensible, if they be rejected. I am at liberty, therefore, to reject them (3 Atk. *supra*), as ungrammatical and insensible. In the language of Lord Denman in *Doe Wyndham v. Carew* (2 Q. B. 320), I do not think "that the Court is bound to find out a meaning" for these words which, while affecting brevity, involve obscurity of such a nature that total reconstruction with added words, or rejection of the words which cause the obscurity, is necessary to make the sentence perfect. I prefer the latter course, not only as in my judgment more consistent with the canons of construction, but as sustaining, instead of avoiding, as the plaintiff asks us, the act of the Judge of the Court of Insolvency in his own County, and in respect of a matter which seems to be highly expedient and proper to be within his jurisdiction. I am of opinion, therefore, that the appointment of James Aldboro Hall by the Judge of the County of Peterborough, wherein no Board of Trade exists, is valid, notwithstanding that it was made within three months from the time the Act came into force, and that there are Boards of Trade in

two adjacent Counties, neither of which has ever yet appointed, or perhaps never can (the three months having elapsed) now appoint an official assignee in the County of Peterborough. The replication, therefore, which proceeds wholly upon the assumption that the appointment is null and void, is, in my judgment, insufficient in law.

My learned brothers have arrived at the conclusion that the true construction of the clause is to give to the Judge the power of appointment within the three months while the Boards of Trade *delay* making the appointment. This solution, however, does not relieve the sentence of the clumsiness of its construction, caused by the introduction of the words "or adjacent to which," and to my mind it appears an easier matter to construe the words, "in which the Board of Trade shall have failed to make such nomination *during the delay aforesaid*," to mean during the period aforesaid," that is, shall have failed during the three months, than to give a grammatical construction to the words "or adjacent to which," standing alone as they do in the sentence. I prefer, therefore, to reject them wholly, as by so doing we have a perfect grammatical and sensible sentence.

GALT, J.—The decision of the demurrer in this case depends on the construction to be put upon the 31st section of the Insolvent Act of 1869. That section is as follows: "The Board of Trade at any place, or the council thereof, shall, within three months from the time at which this Act shall come into force, and afterwards from time to time, within three months after any vacancy, &c., &c., name any number of persons within the County in which said Board of Trade exists, or within any County adjacent thereto, in which there is no Board of Trade, at least one official assignee for each of such Counties, to be official assignee for the purposes of this Act, but such nomination may be made by the Judge in any County wherein or adjacent to which no Board of Trade exists, and also in such County wherein or adjacent to which a Board of

Trade exists, but in which the Board of Trade shall have failed to make such nomination during the delay aforesaid," &c., &c. After a careful consideration of the provisions of this very obscurely worded section, I am of opinion that the Judge of the County Court has the power to make an appointment of an official assignee during the period of three months immediately following the passing of the Act, if the Board of Trade shall have failed during the delay allowed by the Act to make such appointment. Until the Board of Trade acted in appointing official assignees, there would have existed no means for bringing the new Act into operation, had not the Legislature made provision for the case when the Board of Trade failed to act during the delay. We must assume that the persons constituting the different Boards of Trade were aware that it was absolutely necessary that official assignees should be appointed; and although they were allowed a period of three months within which to make their selections, there is no doubt that so long as they did not make them, they failed to discharge a most important duty, and most certainly they can, with propriety, be said to "have failed during the delay to make such nomination." I agree with the judgment of my brother Gwynne as respects the question of the costs, and therefore I am of opinion that judgment on the demurrer should be given for defendant.

HAGARTY, C. J.—I agree with my brother Galt's construction of the Statute, that the order of the Judge was validly made during the delay of the Board of Trade to appoint during the first three months of the operation of the Act. I see no other manner in which we can carry out the apparent intention of the Legislature. I also agree with my brother Gwynne's view as to the costs.

AINSLIE V. RAY.

Several counts in declaration—Damages separately assessed—New trial as to some counts.

Where there are several counts in a declaration, and separate damages have been properly assessed on some of the counts and improperly assessed on the residue, but the verdict has been entered generally for the whole amount so assessed, the Court will confirm the finding as to the one, ordering the verdict to be entered for that amount, and direct a new trial as to the other.

APPEAL from the County Court of the County of Kent.

The declaration contained several counts; the first, conversion of certain goods and chattels (lumber); the second, trespass; the third, detinue in respect of the same chattels; the fourth, the common money count; and the fifth and sixth were special counts for maliciously issuing a writ of attachment and causing the same chattels to be seized.

The jury rendered a verdict of \$50 in favor of plaintiff on the last two counts, and \$115 for the lumber on the other counts; whereupon the learned Judge entered a general verdict for plaintiff for \$165.

This verdict was moved against in the following term on several grounds not material to mention, the case being reported merely as shewing that the Court will order a new trial as to some of the counts of a declaration, directing the verdict to be entered for the amount assessed on the other counts.

The rule to set aside the verdict was discharged by the Court below, and the defendant appealed, *J. B. Read* appearing for the appellant, and *Christopher Robinson*, Q.C., for the respondent.

GWYNNE, J., delivered the judgment of the Court.

This is another of those appeals from the County of Kent in which we are not informed how the learned Judge charged the jury, although it does appear that defendant's counsel did make some exceptions, but what they were is not stated.

I do not see anything in the case sufficient to enable us to say that the verdict which the jury rendered of \$50 on the last counts should be disturbed, but *that* verdict should have been entered upon *these two* counts. As to the \$115, it appears very plainly to have been calculated at the rate of \$5 per 1000 feet on the quantity proved to have been seized under the writ of attachment, and so far as we can see, the only act of conversion or trespass or detention established was the seizure by the bailiff under the writ of attachment, and his taking the defendant's bond for their production. Upon this evidence we do not see how the verdict on those counts, for the \$115, can be at all supported; and as the jury appear to have very properly rendered their verdict, assessing the damages separately, I think that the verdict should have been entered by the Judge as rendered by the jury, and therefore should now be ordered by us to be entered for \$50 on the two last special counts, and the verdict should be set aside upon the other counts; and as no leave to enter a nonsuit appears to have been reserved, we must order a new trial as to the first four counts. In *Maggs v. Day*, reported in the Weekly Notes of January 29th, 1870, in an action in the Common Pleas, brought to recover three pieces of land, a verdict was rendered for the plaintiff in respect of two of the pieces of land, and for the defendant as to the third. A rule having been obtained to set aside the verdict as to the finding for the plaintiff, and for a new trial, the Court, notwithstanding the strenuous opposition of the plaintiff's counsel, limited the new trial to the portions of the land mentioned in the rule.

In the case before us the causes of action could not have been united except under the provisions of the Common Law Procedure Act. Under the 74th section the Judge might have ordered separate trials of the separate causes of action upon distinct records, and I can see no reason why, one of the causes of action having been determined by the jury, and damages specially assessed by them, and there being no sufficient ground to disturb that verdict, the other cause

of action alone should not be sent to a new trial: we should only send for a new trial that cause of action in respect of which there has been a mistrial, and suffer to stand that which there is no sufficient reason shewn for disturbing.

Ordered that verdict for plaintiff for \$50 be entered on two last counts, and rule to go for a new trial as to the residue only.

Rule accordingly.

TAYLOR V. THE MUNICIPAL CORPORATION OF THE TOWNSHIP
OF VERULAM.

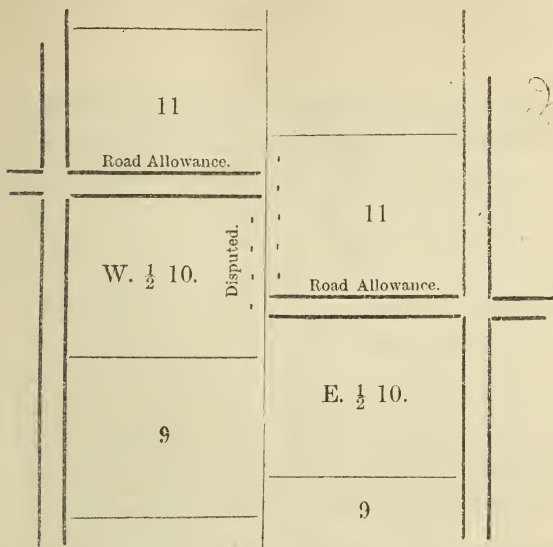
Trespass—Lots with double-fronts—Road unauthorized by by-law.

Where half lots, under the double-front system of survey, did not correspond or meet in any point, and land was taken by the municipality from the plaintiff's lot, in order to make a road to join the side line road allowances, without the passage of any by-law for the purpose, *Held*, that there was no power so to do, and that trespass would lie against the municipality.

SPECIAL CASE.

The action was for certain alleged trespasses committed under the authority and by the direction of the defendants, under the following circumstances: The plaintiff was owner in fee of lot 10, in 9th concession of the township, of Verulam, in the county of Victoria, which township was surveyed with double-front concessions, and the lands were described in half lots, east and west halves, as mentioned in sec. 28 of ch. 93, Consol. Stat. U. C. There was an allowance for road or communication line, according to said survey, on the north side of each of said halves of lot 10, and between said halves there was a jog of about 90 rods, as the following sketch will shew:—

9TH CONCESSION.



The alleged trespasses consisted in an attempt, under defendants' authority, to force a road along the centre of the concession, for the purpose of joining the ends of the allowance for road, such road to be 33 feet on each side of the centre of the said concession, as also shewn upon said sketch, and plaintiff's fences were taken down for the purpose, defendants claiming the right so to do without the passing of a by-law to open a new road, under the general powers given them by the Municipal Acts, or paying any compensation for the land taken for such road.

The question was whether defendants had such right.

C. S. Patterson appeared for the plaintiff, and *D. B. Read*, Q.C., for the defendants.

GWYNNE, J.—I know of no principle of law, nor was any urged upon us, which could justify the contention of the defendants that they have any power to make the road complained of otherwise than under a by-law passed in due form of law for the purpose of opening a new road.

Our judgment, therefore, upon this special case is for the plaintiff, with 1s. damages, and full costs of suit, as agreed upon.

HAGARTY, C. J.—The trespass has been committed under a misapprehension of the meaning of the 28th section of U. C. Consol. Stat. ch. 93. The section merely prescribes a mode of determining the boundary, and has no effect upon roads. It says that “a straight line joining the extremities of the division or side lines of any half lot in such concession, drawn as aforesaid, shall be the true boundary of that end of the half lot which has not been bounded in the original survey.” But for the “jog” the road allowance along the north side lines of the east and west halves of 10 would have been a continuous straight line. Because half lots under the double-front system of survey happen not to correspond, or if they did not meet in any point, we see no reason for taking land from the next lot to make a road to join the side line road allowances. The Statute gives no sanction to such a course.

GALT, J., concurred.

Judgment for plaintiff.

JONES V. MONTGOMERY.

Demise of land—Land to be chopped and cleared, whether liable to rent — Construction.

Plaintiff demised to defendant certain land at "the clear yearly rent of \$1.50 per acre of cleared land, on 1st February in each year, one-half in cash and one-half in work on said land, in clearing and fencing as herinafter mentioned," with a covenant for payment of taxes by defendant, with liberty to deduct one-half, exclusive of statute labour, from the rent, one-half from the money and one-half from the rent to be paid in labour, and defendant within the first year to make and put up in the fences on said cleared land 2,000 rails, for which he was to be allowed out of said rent \$20, viz., \$10 out of the money rent, and \$10 out of the labour rent; with the further agreement, as to the rent to be paid in work, that the defendant should be allowed at the rate of \$13 per acre for the land which he should chop, log, clear, and fence, in payment of said rent. Then there was another clause "that the portion of said lot now chopped, *but not cleared*, and also the portion under contract with L. McKay for chopping, shall be logged, cleared and fenced, within two years from the date, by the said lessee, who, in return for his work *on said portions* of land, shall have two crops therefrom free of rent, and shall afterwards pay the same rent per acre for said portions as for the land now cleared:"

Held, that there was nothing expressed in the lease to charge the tenant with rent for the land to be chopped, cleared, and brought into cultivation by him, nor could any such liability be implied.

THIS was a County Court case, tried, before Morrison, J., at the last Spring Assizes at Goderich, in which a verdict was rendered for the defendant, with leave reserved to the plaintiff to move to enter a verdict for him for \$20, if the Court should be of opinion that he was entitled to recover rent for the land the defendant cleared during the term.

The action was for breach of covenant contained in a lease, and the point for decision was, whether certain land, to be chopped, cleared, and brought into cultivation by the lessee during the period of the lease, was chargeable with rent from the time of the clearance being so made. The material portions of the lease are set out in the judgment.

In Easter Term last, *Osler* obtained a rule *nisi* in the terms of the reservation at the trial, to which *S. Richards*, Q.C., shewed cause, and which *T. Moss* supported.

No cases were cited, the argument being confined to the construction to be put upon the clause of the lease above referred to.*

GWYNNE, J., delivered the judgment of the Court.

The question which we have to decide arises upon the construction of a lease, and it is, whether land to be chopped and cleared, and brought into cultivation by the tenant during the term, became liable to payment of rent thereupon from the time of its being so cleared.

The plaintiff, by an indenture dated 21st October, 1864, demised to the defendant lot No. 19, in the 4th concession of the township of Culross, *habendum* for five years from the 1st day of February, 1865; *reddendum*, "the clear yearly rent of \$1.50 per acre of cleared land, on the 1st day of February in each year, one-half in cash and one-half in work on the said land in clearing and fencing as hereinafter mentioned." Then, there is a covenant that the lessee shall pay the taxes, provided always that he may deduct one-half of the taxes, exclusive of the statute labour, from the rent, one-half from the money and one-half from the rent to be paid in labour, and that the lessee will, within the first year of the term, make and put up in the fences on the said cleared land 2,000 rails, for which he is to be allowed out of the said rent the sum of \$20, viz., \$10 out of the cash rent and \$10 out of the rent to be paid in work. Then, as to this rent agreed to be paid and taken in work, "it is agreed by and between the parties that the said lessee shall be allowed at the rate of \$13 per acre for the land which he shall chop, log, clear, and fence, in payment of the said rent."

Now, if the lease had stopped here, the amount of the rent would have to be determined by ascertaining the quantity of cleared land at the time of the execution of the lease, and there would be no expression in the lease which could justify the construction that the lessee should pay rent upon the land which he should chop, clear, and bring into cultivation: the only provision in the lease relating to such land would then be the provision that in so far as half of the rent would authorize, after deducting the \$10 in the first year for fencing, and one-fourth annually of the taxes, other than the tax for statute labour,

the tenant should be allowed \$13 per acre out of the rent; and a covenant of the tenant to cultivate, till, and manure, in a good husbandlike and proper manner, not only such part of the said demised premises as at the time of the execution of the lease was cleared, but also such part thereof as should thereafter *be* brought under cultivation. The question then is whether or not there is any thing else in the lease which warrants the construction that the tenant agreed to pay rent upon such land as he should chop, clear, and fence. The only other clause in the lease is an agreement "that the portion of the said lot now chopped, *but not cleared*, and also the portion under contract with L. McKay for chopping, shall be logged and cleared and fenced within two years from the date by the said lessee, who, in return for his work *on the said portions* of land, shall have two crops therefrom free of rent, and shall afterwards pay the same rent per acre for *the said portions* as for the land now cleared."

The reason for this clause seems plainly to have been that, inasmuch as, in respect of these portions, the landlord had himself provided for a portion of the expense of clearing them, it was but reasonable that he should get some return for that labor, but as they were *not yet cleared* there would be no rent payable in respect of them; therefore two crops being deemed sufficient remuneration for the work to be done by the tenant to make these portions cleared land, it was provided that from the expiration of these two years, within which the tenant was to complete the work to be done on these portions, and to take his two crops, the portions so cleared should be liable to rent. Now the expression that for these portions the tenant should then pay the same rent per acre as *for the land now cleared*, shews that the parties contemplated that the rent mentioned in the *reddendum* should be calculated upon the land which was cleared when the lease was executed, and the whole of this clause is limited to making provision for those particular portions. There is then nothing in this clause, and consequently nothing in the lease, to justify

the construction that the tenant should pay rent upon the land which he himself, irrespective of these portions, should chop, clear, and bring into cultivation, and we cannot import into the lease any agreement by implication to this effect; indeed, the facts of this case shew that it would work extreme hardship upon the tenant to do so. At the time the lease was executed there were not thirty acres cleared. How much was in the portions referred to in the last clause does not appear, and therefore we cannot see how much the rent became increased after the expiration of the first two years. For the first two years, however, there were but \$22.50 payable in work, from which must be deducted the \$10 for the first year, on account of the 2,000 rails and one-fourth of the taxes, leaving about, say, \$10, to be applied in clearing new land in the first year, and deducting the taxes in each succeeding year, there would not be more than, say, \$20, in each year to be applied in clearing land, amounting in the whole to about \$90 in the term of five years, the whole amount which the landlord agreed to contribute towards the clearing which the tenant should do. Now \$13 may be, for anything which appears, but a portion of what the cost of chopping, logging, clearing and fencing land may be; but, taking \$13 as the cost, then the tenant has so cleared twelve acres, which amounts to a cost of at least \$156, \$90 of which is the utmost which the landlord is to contribute. Upon what principle of justice should we imply an agreement that the tenant should pay rent upon land, about one-half of the expense of clearing which, assuming \$13 to be the full cost value for the work, was incurred by the tenant. In my opinion, therefore, there is nothing expressed in the lease to charge the tenant with the rent claimed, nor can we imply any such agreement. The rule therefore will be discharged.

Rule discharged.

FRASER V. WEST.

Sale of land for taxes—Defects attending sale—33 Vic. ch. 23, Ont.—Description in Sheriff's deed—7 Wm. IV. ch. 19.

It is not incumbent, under 33 Vic. ch. 23, Ont., for the tax purchaser, for the purpose of bringing himself within the protection of the first section of the Act, in cases where he has paid eight years taxes charged on the lands, to prove that the taxes so paid had been legally charged, but the production of the Treasurer's books, shewing that such taxes had been charged and paid, is sufficient.

Under that Act any person claiming under the tax purchaser may avail himself of the provisions of the Act.

The description in the Sheriff's deed was "75 acres of the front part of the W. $\frac{1}{2}$ of lot No. 5, in the 1st Concession of the Township of Winchester: Held, sufficient under 7 Wm. IV. ch. 19.

Ejectment for west half of lot 5, in 1st concession, Winchester.

The trial took place at the last Spring Assizes at Cornwall, before *Galt*, J.

The plaintiff claimed title in two modes; 1st, as assignee of one Lucy McQueen, who claimed as heiress-at-law of the devisee of the original patentee; and 2nd, under and by virtue of a deed of conveyance from Mary Fraser, who was devisee of Richard Duncan Fraser, who was grantee of Alexander McLean, who was grantee under and by virtue of a conveyance or deed-poll from the Sheriff of the Eastern District of the late Province of Upper Canada.

The defence was limited to the whole frontage or south part of the land in question, with sufficient depth to embrace 75 acres.

It is unnecessary to set out the evidence under the first mode, as no objection was made at the trial as to the sufficiency of the proof.

The following evidence was given in proof of the second mode :

Alexander McLean : " I bought lot 5, west half, in 1st concession, Winchester, in 1830, at a sale for taxes." [Witness proved a deed from himself to Richard Duncan Fraser, dated 16th June, 1842, of this land]. " Mr. Fraser has been dead many years. He was father of plaintiff." Angus McDonell : " Knew the late Richard Duncan Fraser. I was present when his will was made. I was a witness to it. I saw Fraser execute it. I saw the other witnesses sign." (Will produced and put in). " This will devises the land in question to his wife, Mary Fraser." Grace McQueen Rupell : " I knew plaintiff's mother. She was the widow of Richard Duncan Fraser. I saw her sign the deed conveying the land to the plaintiff." Deed put in. Augustus Keefer : " I know the land in dispute. In the month of February, 1854, I went out on the lot with Angus and Jacob Murkley. I went at the request of Richard Duncan Fraser, and we found a small shanty on the land. We went to take possession for Mr. Fraser. I opened the door : there was nothing in the house but an old cooking-stove : this was carried out by McDonell and Murkley. I then gave possession to Jacob J. Murkley, and gave him duplicate of the lease now produced." Not put in, as nothing turned upon it. Jacob J. Murkley : " I remember the lease. We carried the old stove out on to the concession line. I did not occupy the land. I paid no rent."

This closed the plaintiff's case. For the defence the following evidence was given :

It was admitted that there was no record among the records of the Quarter Sessions of the imposition of any rate by the Court of Quarter Sessions as respected this lot ; also that there was no warrant in the office of the Clerk of the Peace for the sale of this land. There was a schedule of lands in arrear for taxes, in part or in the whole, of eight

years, ending 1st July, 1838, put in. This schedule was endorsed, "Schedule of lands in arrears for taxes ending 1st July, 1838, Eastern District. Eleven writs issued 11th December, 1839, returnable 14th July, 1840. To Sheriff Eastern District, Alexander McMartin." It was admitted that the endorsement was in the handwriting of Mr. Pringle, the then Clerk of the Peace, since deceased. The present Treasurer of the County was called; stated that he was appointed Treasurer in 1846; he produced a return of sale by the sheriff of 75 acres of west half of lot 5 in 1st concession, Winchester, on 12th July, 1843, which he found among the records of his office. He proved that Alexander McMartin was then sheriff, and that he had since died. He stated: "There are no arrears of taxes on the 75 acres up to November, 1869. They were paid on 5th October, 1869. \$31.05 were paid by one John A. Brown. There were taxes for 1864, 1865, 1866, 1867, 1868, included in this. Charles Poole proved that he was a clerk in sheriff's office, and produced a book containing copies of warrants and list of sales of land for taxes in the handwriting of the late sheriff and of his deputies. He received the book from the widow of the late sheriff. He was managing her estate. He searched for the records of sales for taxes among the sheriff's papers about three years ago, and gave all he could find to the new Clerk of the Peace. It was admitted that there was no warrant for the sale of this land to be found in the office of the Clerk of the Peace then. Peter Stewart proved that he was deputy sheriff in 1843, and that he sold the land, 75 acres of west half of lot 5 in 1st concession, Winchester. (This was the land in dispute.) "They were the south 75 acres. The sale was made under a warrant from the clerk of the peace to the sheriff. The entry of the sale is in the handwriting of Duncan McGruer. The book (referring to the book produced by last witness) is a copy of the list of lands included in the warrant, and is in the handwriting of the late sheriff." He remembered the par-

ticulars of the sale, because it was the first he attended. "The memorandum in the words (in the book) of the south end of the west half, was made by the sheriff when he executed the deed." The deed from the sheriff, dated 24th September, 1844, was then put in, and the execution admitted. It was in the usual form of sheriff's deeds for taxes. The granting part, on which alone any question turned, was as follows: "I, Alexander McMartin, Esq., sheriff of the Eastern District, do, by these presents, grant, bargain, and sell unto the said James West, his heirs and assigns, *seventy-five acres of the front part of the west half of lot number five in the first concession of the township of Winchester, Eastern District.*" This deed was duly registered on the 7th February, 1845. The following documents were then put in:—1st. Exemplification of a judgment of the County Court of the United Counties of Leeds and Grenville, in a suit, *Benjamin French v. James West*, for £95 4s. 5d. 2nd. Exemplification of *fi. fa.* goods on said judgment, and return of *nulla bona*. 3rd. Exemplification of *fi. fa.* lands and return of lands on hand for want of buyers. The following evidence was then given to account for the non-production of a writ of *ven. ex.*:—David Henry Mooney: "Am managing clerk in the office of Neil Clark, who was attorney for plaintiff French. I searched the office thoroughly, and could find no *ven. ex.*" Samuel Reynolds: "Am deputy clerk of the crown. I searched for a *ven. ex.*, and found none." George S. Jarvis: "Am deputy sheriff. It appears from the book that a writ of *ven. ex.*, in *French v. West*, was received in the sheriff's office on 4th February, 1865. The entry is in my handwriting, and I had the *ven. ex.* in my possession when I made the entry. I searched for *ven. ex.*, and cannot find it. It appears to have been returned to plaintiff's attorney." 4th. The deed from the sheriff conveying to the said Benjamin French several parcels of land, and, among others, "Part of the west half of lot number five, in the first con-

cession of the said township of Winchester, containing seventy acres, and which is more particularly described in the said indenture of mortgage to the said Sarah M. McDonell, dated 12th day of February, A. D. 1863, and registered in the registry office of the said county of Dundas, on the 17th day of the same month." 5th. The mortgage above referred to bore date 12th February, 1863, and was registered on 17th February, 1863, and was made for securing payment of \$910, and conveyed, among other lands, the premises in dispute, under the following description: "The front seventy-five acres of the west half of lot number five, in the first concession of the township of Winchester, in the County of Dundas and Province aforesaid." Execution admitted. 6th. An assignment of said mortgage from the mortgagee to John Smith Brown. Execution proved. 7th. A conveyance from Benjamin French, and Sophia his wife, to John Smith Brown, of several pieces of land, and among them of this land, described as follows: "Part of the west half of lot number five, in the first concession of the said township of Winchester, containing seventy acres, and which is more particularly described in the said indenture of mortgage to the said Sarah McDonell, dated the 12th day of February, 1863, and registered in the Registry Office of the said county of Dundas, on the 17th day of the same month." 8th. A deed from John S. Brown to Catherine West (the defendant), dated 12th October, 1869, and registered 25th October, 1869, proved. 9th. A discharge from John S. Brown, dated and recorded on 25th October, 1869, of the mortgage originally made to Sarah McDonell, so far as it related to the land in question. The following receipts from the treasurer, for taxes, were then put in: "£4 15s. 5d. Received from James West, Esq., the sum of four pounds fifteen shillings and five pence, being the tax due up to 31st December, 1862, on the west half of lot number five, in the first concession of Winchester."—"Received from

John R. Brown the sum of \$31.05, being taxes due on the following lands up to 31st December, 1868, viz., lot north west half five, first concession Winchester, 100."

At the close of the case the learned Judge directed a verdict to be entered for the defendant, subject to the opinion of the Court, which was to draw inferences.

In Easter Term last, *Leith* obtained a rule to set aside the verdict, and enter it for plaintiff, or for a new trial, on the law and evidence, in this, that the sale for taxes and conveyance thereon by the sheriff to the defendant, James West, was void, on the grounds, 1st. That it did not appear that the taxes for which the lands in question were sold were ever duly imposed or rate declared by the Court of Quarter Sessions. 2nd. No account was kept, as required by law, by the treasurer, of taxes in respect of said lands, and no taxes for which the lands were sold appeared in any account of the treasurer to have been due up to the year 1838. 3rd. No legal evidence of any writ having issued for the sale by the sheriff of the lands. 4th. Though the patent issued for the west half only of the lot, the account by the treasurer (if any) for taxes, was kept against the whole lot, and not against the west half only, and yet the return by the treasurer (if any there was) of taxes in arrear, was as to the west half only. 5th. Said sale for taxes was had for alleged arrears, part of which was due, if not all, in respect of the east half of the lot. 6th. Sale was had for more than was due. 7th. No evidence of any absence of property on the lot, that might have been distrained on prior to the sale. 8th. Sheriff sold after the return day of the writ, and there was no evidence of any facts authorizing a sale after such day. 9th. The land sold, and the conveyance by the sheriff of the said sale, uncertain as to locality, and sale and conveyance therefore void. 10th. Sheriff at said sale did not put up for sale, or declare that he put up, any particular or certain

part of the land, or adjudge any particular or certain part to the highest bidder. 11th. Did not appear that the said west half was ever included in any return or schedule by the Surveyor-General, pursuant to the Assessment Act. 12th. If said sale and conveyance by the sheriff for taxes was invalid, neither the sale nor conveyance was made valid by the Act of 33rd Victoria, ch. 23, and the evidence given at the trial to bring the case within that Act.

That there was no evidence that the purchaser at the sale for taxes, or any one claiming through or under him, had occupied the lands sold, or any part, for four years, or improved the same, or paid eight years' taxes, as required by the Act, to cause it to apply. The evidence given of taxes paid since the sale did not appear to be taxes charged on the said half lot, or any part of it, and any taxes paid by John S. Brown or Catherine West were not a payment of taxes within the meaning of the said Act, as the said Brown and Catherine West did not legally claim through or under the purchaser at the sale for taxes, the sheriff's sale to Benjamin French of the equity of redemption being void, as being of the equity in part only of the lands mortgaged, and as Catherine West took nothing by the conveyance from said Brown to her of the mortgage to Sarah M. McDonald, or the lands, by reason of the prior discharge of such mortgage.

Also because the sale or conveyance was not made valid by the said Act, as the lands were not legally liable to be assessed for the taxes for which the sale was had.

Or for a new trial for the rejection of evidence of the value of the land and improvements, as provided by the ninth section of the said Act.

S. Richards, Q. C., shewed cause, citing *McDonald v. McDonell*, 24 U. C. 74; *Cotter v. Sutherland*, 18 C. P. 399; *Ash v. Somers*, 22 U. C. 191; *Shep. Touch.* 250, 251.

Leith (with him *Snelling*), contra, cited *Yokham v. Hall*, 15 Grant, 335; *Peck v. Munroe*, 4 C. P. 372; *Davidson*

Conveyancing, 3rd ed. 623; *Heward v. Wolfenden*, 14 Grant.

The statutes cited are referred to in the judgment.

GALT, J.—In the preamble to the Act of the Legislature of Ontario, 33 Vic., ch. 23, it is recited that, “Whereas many lands in the Province of Ontario, having been liable to be assessed for taxes, have been assessed and sold for taxes, and frequently in such cases the sales or conveyances made thereon are invalid by reason of defects or irregularities caused by the public officers of the municipalities charged with the assessing, sale, or conveyance; and the original owners, whose lands were sold, have, for the period during which the land was so assessed, and since, neglected or refused to pay any taxes, or to redeem the lands; and whereas, also, in many cases, the purchasers at such sales, or those claiming under them, have entered into possession and continued in possession for several years, and made extensive improvements on the lands, and paid the taxes charged thereon, without any steps having been taken by the original owners to question the validity of such sales; and also, in other cases, after improvement so made, those who have made the same, after many years’ occupation, have been dispossessed by the original owners, or by purchasers from them at a small and inadequate price; and *it is expedient that a remedy be provided* in those cases where purchasers, or those claiming under them, have gone into possession and improved; *and also where the lands, having continued vacant, the purchaser, or those claiming under him, have paid taxes since the sale; and it is also expedient that those claiming lands sold for taxes should assert their own rights of action or of entry, or forego such right rather than sell the same to a purchaser.*”

By the second section of the Act the first section thereof (subject to the exceptions in the sub-sections thereof, none

of which apply to the case now before us), "shall apply also to make the sale valid in those cases in which the tax purchaser shall not have occupied the land or any part thereof, or, having occupied, shall not have occupied for the four years mentioned in the first section, or shall not have made improvements thereon to the value mentioned in such first section; provided the tax purchaser has, since the sale and prior to the first day of November, 1869, paid at least eight years' taxes charged on the said lands; and provided that the owner has not occupied the lands, or some part thereof, for one year before the sale by the Sheriff and the said first day of November."

Before considering the provisions of the first section, under which alone the tax sale, through which the defendants claim, can be supported, we must be satisfied that the defendants can bring themselves within its protection, because it is not pretended that any actual occupation for four years before 1st November, 1869, took place, nor were improvements made upon the land. It is under the second section, if at all, that the defendants can avail themselves of the first, namely, by proving that they, or those through whom they claim, have paid at least eight years' taxes charged on the said lands. This is the objection pointed at by the 12th section of the plaintiff's rule, viz., that "there was no evidence that the purchaser at the sale for taxes, or any one claiming through or under him, had paid eight years' taxes, as required by the Act."

The evidence as to the fact of payment appears very clear. The land was conveyed to the tax purchaser on 24th September, 1844, and on 17th October, 1863, he paid the taxes due up to 31st December, 1862, and on 5th October, 1869, John R. Brown, who claimed title under the title derived from the sale for taxes now in question, paid the taxes for 1863, 1864, 1865, 1866, 1867, and 1868. We can therefore have no doubt as to the actual payment. But it is said that before a payment of taxes can be held sufficient to bring the case within the first section, evidence must be given, not only that the eight years' taxes were charged

against the land, but that they were *legally* charged. When it is borne in mind that the provision is introduced for the purpose of bringing a case within the protection of the first section, we think that the only fair interpretation to be put upon it is, that where a party purchasing continues to pay taxes for eight years upon the land bought by him, that he shall be protected without being called upon to prove that the said taxes were legally imposed, more especially as the law, as it stood for many years before the passing of the Act, rendered the lands liable to be sold for taxes if only five years were in arrear. The whole intention of the Act would, in our opinion, be defeated if we held otherwise, for the object of the Legislature was avowedly to protect purchasers where the taxes had been illegally imposed. Moreover, it is in this sense that the word "charged" is used throughout the Statute. In the preamble it is certainly so used;—"and paid the taxes charged thereon;" "and paid taxes since the sale." In the first section it is said, "In all cases where lands which were liable to be assessed according to the true intent and meaning of the Statutes in that behalf, have, or any part thereof has, been sold and conveyed under colour of such Statutes for taxes in arrear," &c., &c., "shall be decreed valid, notwithstanding the taxes were not imposed or charged in due form, as required." It would be a very singular interpretation to put upon the Act, if we were to hold that a sale for taxes would, under the terms of the first section, be made good, even if the tax was illegally charged, and yet that a payment of taxes, to bring a case within the protection of the Act, would be invalid unless the tax was legally charged. Again, in the same section it is said that the sale shall be valid notwithstanding any informality or defect in the keeping of accounts of the taxes charged against such lands, or with which they were chargeable." It is evident here that the words indicate that the taxes charged may have been improperly charged, but the sale is good if the lands were chargeable. We think, therefore, the payment of taxes charged against the

land for eight years prior to 1st November, 1869, brings the purchaser within the provisions of the first section, and that he is not called upon to prove that the taxes so paid were legally charged. There is, however, another exception taken in this case, namely, that the party who paid the taxes was not the "tax purchaser." By the 14th section, the words "tax purchaser" are to be held to include and extend to all persons claiming through or under him. The objections pointed out by the rule have reference to a defect in the title of the defendant, as claiming under a title derived from West, the original tax purchaser; in other words, it is an assertion made by plaintiff of the title of a third person not before the Court, and set up, not in his interest, but for the purpose of destroying, not only the estate of the defendant, but of the third party himself. We do not feel called upon to decide as to the validity of the objection taken: it is sufficient to say that the taxes were paid by persons "claiming through or under the tax purchaser," and not by any person on behalf of this plaintiff. It is manifest that it was the payment of eight years' taxes by any person claiming to hold under the tax purchaser which should prevail as against the original owner, and if there is any invalidity in the title of the person so claiming, it should be decided between those parties. All that the Legislature has said is, that the taxes must be paid by a person "claiming" under the tax purchaser. This objection, therefore, should not prevail.

The result of the foregoing observations is, that in our judgment the defendants have brought their case within the proviso contained in the second section.

The other objections have now to be considered. The first section of the Statute 33 Victoria enacts: "In all cases where lands, which were liable to be assessed according to the true intent and meaning of the Statutes in that behalf, have, or any part thereof has, been sold and conveyed under colour of such Statutes for taxes in arrear, and the tax purchaser at any such sale had, prior to the first day of November, 1869," &c., &c., "such sale shall be

deemed valid, notwithstanding the taxes or the Sheriff's fees and charges, for which the lands were sold, were not imposed and charged in due form, as required or authorized by the said Statutes, or any of them, or exceeded the amount lawfully chargeable." The lands in this case were patented in May, 1803, and were liable to be assessed. The above provisions, therefore, dispose of the 1st, 6th, and 11th objections. The section then proceeds: "And notwithstanding any defect in the warrant to sell, or that such warrant was issued too soon, and notwithstanding any irregularity in the notice of sale, or the advertizing or publishing thereof, or in or as to the time and place of any such sale, or as to any adjournment of sale; and notwithstanding that there was on such lands any property that might have been distrained." These provisions cover the 3rd, 7th, 8th, and 10th objections. The Act then proceeds: "And notwithstanding that the lands have been assessed against some person as resident or occupant, when they should have been assessed as non-resident lands, or were assessed as non-resident lands when they should have been assessed against the owner or occupant, or both; and notwithstanding any informality or defect in the keeping of accounts of the taxes charged against such lands, or with which they were chargeable." This disposes of the 2nd, 4th, and 5th. The concluding part of the section then has these very general words: "And notwithstanding any other omissions, insufficiency, defects, or irregularities whatsoever, as regards the assessment or sale, or the preliminary or subsequent steps required to make such sale effectual in law."

There are several provisions which follow, but they have no bearing on this case.

The intention of the Legislature clearly was, that every sale for taxes should be sustained where lands were liable to be assessed, except in cases specially provided for, none of which apply to the one before us. The words are so very general that it is hardly possible to state a case that would not be affected by them; and in the argument

before us, it appeared to be conceded that, unless the title of the defendants in the present instance was not avoided by reason of the non-compliance with the terms of the proviso in the second section, that the plaintiff would fail, unless for the 9th objection, "that the land sold and the conveyance by the Sheriff on the said sale are uncertain as to locality, and the sale and conveyance therefore void;" in other words, that the deed from the Sheriff to West was void for uncertainty. The description in the Sheriff's deed is, "Seventy-five acres of the front part of the west-half of lot number five, in the first concession of the township of Winchester."

In the case of *McDonell et al v. McDonald* (24 U. C. 74) it was held that the deed of lands sold for taxes, where the description was identical with that in this case, namely, "eighty-nine acres of the south part of the east half of lot number twenty-five, in the second concession of the township of Charlottenburg," (here they are "seventy-five acres of the front part of the west half of lot number five, in the first concession of the township of Winchester)," was void, as the sheriff had not complied with the provisions of the 13 & 14 Vic. ch. 67, sec. 57, by describing the land by its situation, boundaries, and quantity.

The sale now in question was not made under the provisions of that Act, and consequently, so far as they apply, the case has no bearing on that now before us. The enactments under which this sale took place were the 6 Geo. IV. ch. 7, sec. 13, and 7 Wm. IV. ch. 19. The 13th section, as it originally stood, was as follows: "That the sheriff shall expose to sale, upon such writ as aforesaid, the several lots or parcels of land therein mentioned, in the following manner, that is to say, he shall begin at the front angle on that side from whence the lots are numbered, and measure backward, taking a proportion of the width corresponding in quantity with the proportion of such particular lot in regard to its length and breadth, according to the quantity required to make the sum demanded." It is to be observed that this course was prescribed to the sheriff and obligatory

upon him; but by 7 Wm. IV. ch. 19, sec. 5, it is enacted, "That in all future sales for arrear of taxes it shall be lawful for the sheriff, at his option, to put up and adjudge to the purchaser of any part of a lot, liable to be sold for such arrears, such part of the said lot as he may in his discretion think best for the interest of the proprietor, anything in any Act of the Parliament of this Province to the contrary notwithstanding." Acting in accordance with this enactment (which we are bound to assume the sheriff did), he adjudged to the purchaser "seventy-five acres of the front part of the west half of the lot in question." It was not at that time incumbent on the sheriff to give any description by boundaries, and when we reflect on the provisions of 6 Geo. IV. ch. 7, which, although not expressly repealed, were yet rendered nugatory at the option of the sheriff, and the extreme inconvenience which must have followed under that Act if any portion of a lot was sold, for in every such case a part of the lot corresponding in shape and differing in size according to the original survey, must have been conveyed by the sheriff, we think that the sheriff in this case complied with the provisions of 7 Wm. IV. ch. 19.

There cannot, in our opinion, be any difficulty in ascertaining the land intended to be conveyed. The words used in their ordinary signification mean that those seventy-five acres on the front of the lot are granted, and this would necessarily include the whole of the frontage by such a depth as would be required to make up seventy-five acres. The sheriff was not required to have a survey of the lot made to ascertain what that depth would be. All that he was required to do was to adjudge to the purchaser such part of the lot as he, in his discretion, might think fit. There could be no difficulty experienced by any surveyor in laying off the portion of land granted.

The case of *Joiner et al v. Colborne* (11 U. C. 631) was a case in which by agreement the south hundred acres of lot 15, in 7th concession, Norwich, were agreed to be sold, and although the case went off on another point, there was no question made by the Court but that in the absence of

a particular stipulation, which formed part of the bargain in that case, the whole frontage of the lot would have passed, with a depth necessary to make up one hundred acres.

There was no suggestion that the agreement would have been void for uncertainty. We think that this objection also fails, and that the rule should be discharged. The objection taken in the rule as to the existence of evidence would have been of importance only in case we had thought the deed void for uncertainty.

GWYNNE, J.—This case, as it appears to me, turns wholly upon the question whether or not the defendant's title, which is under a deed made the 24th September, 1844, in pursuance of a tax sale, is brought within the protection of the Ontario Statute 33 Vic., ch. 23. It was admitted that there are defects sufficient to defeat the sale, and to entitle the plaintiff to judgment, unless the above Act protects the defendant's title. Whether or not the case is brought within the protection of the Statute depends upon the conclusion which we should arrive at upon two questions: 1st, Whether or not the description of the lands intended to be conveyed by the Sheriff's deed to James West is too uncertain to have any operation; for if it be, that is a defect not touched by the Statute in so far as this case is concerned, which does not come within the 9th section; and 2nd, Whether, assuming the description to be sufficient, the payment of taxes since the sale, shewn in evidence, is a payment of eight years' taxes within the 2nd section of the Act.

The sale for taxes took place under the provisions of 7 Wm. IV., ch. 19, sec. 5. The Sheriff, not being fettered by 7 Wm. IV., ch. 19, with any direction as to how the land should be described in a deed executed by him on a sale for arrears of taxes, the sufficiency of his deed in this case, as to the description of the land, must, as it appears to me, be governed by the same rules as would govern in the case of the same question arising on any deed *inter*

partes. The question then is, would this description be sufficient in a deed *inter partes*? The description is: "Seventy-five acres of the front part of the west-half of lot number five in the first concession of the township of Winchester."

We must construe the deed so that every part of it may, if possible, take effect, and so as to preserve rather than to destroy the effect of the deed: *Broom's Maxims*, 522; *Shep. Touch.* 84.

Now, what is the front part of any lot in any concession? 22 Vic., ch. 93, sec. 26, defines the front of a concession, where only a single row of posts has been planted on the concession lines and the lands have been described in whole lots, to be that end or boundary of the concession which is nearest to the boundary of the township from which the several concessions thereof are numbered, and in double front concessions, by section 20, each end of the concession shall be the front of the respective half of such concession. The front part of a lot, then, is that *end* of the lot abutting on the concession line in front of the concession; and under the term, *the front part* of a lot, every particle of the lot, as it appears to me, which abuts on *such* concession line, must be included. *The front part* of a lot, consequently, comprehends the whole width of the lot abutting on the concession line in front of the concession. This determines the point, for it cannot be a part of the front part which is granted, inasmuch as 75 acres exceeds the front half, and the front part cannot be *more* than the front half. There are no two pieces of land which can be said equally to meet the description; the only piece of land which can supply the description above, so as to give effect to the deed, will be 75 acres measured back from the front for the full width of the front until the 75 acres are obtained. That or nothing is what is granted, and to give effect to the deed we must, I think, hold the description to be sufficiently certain and to comprehend the front 75 acres of the west-half of lot number five, measuring from the front the full width of the lot as abutting on the con-

cession line in front of the concession, a sufficient distance back to make 75 acres. In *McDonald v. McDonell et al.* (24 U. C. R. 424), a description similar to this in a Sheriff's deed, on a sale for arrears of taxes, was held insufficient, because that sale took place under 13 & 14 Vic., ch. 67, sec. 53, which required the Sheriff to describe the lands by boundaries in the deed. In this case that difficulty does not present itself. It was proved at the trial that James West, the purchaser, paid, on the 17th October, 1863, the sum of £4 15s. 5d., being the taxes due up to 31st December, 1862, on the west-half of lot No. 5 in the 1st concession of Winchester. For what period this payment was made did not appear. It also appeared that on the 3rd October, 1869, one John R. Brown paid \$31.05, being taxes due on the same piece of land up to 31st December, 1868. This would seem to be for the six years' taxes from 31st December, 1862. It has not been disputed before us that full eight years' taxes prior to the 1st November, 1869, were paid by West and Brown together, but it was contended that it was not shewn that the taxes which were paid were paid by the tax purchaser within the meaning of the Act, and that it was necessary to shew that the taxes which were paid had been legally imposed and assessed. Now the tax purchaser, James West, by indenture dated the 12th July, 1863, mortgaged the land in question to one Sarah Maria McDonell, by the following description: "The front 75 acres of the west half of lot No. 5, in the 1st concession of the township of Winchester." By an indenture dated the 19th March, 1867, Sarah Maria McDonell assigned and transferred the mortgage and the lands therein described to John Smith Brown.

By a deed dated the 15th June, 1865, the Sheriff of the county of Dundas, in virtue of an execution issued upon a judgment obtained against James West, sold to one Benjamin French all West's estate, which then was an equity of redemption in the lands in question, by the following description: "Part of the west-half of lot No. 5, in the 1st concession of the township of Winchester, con-

taining 70 acres, and which is more particularly described in an indenture of mortgage bearing date the 12th day of February, A.D. 1863, and registered in the registry office of the said county on the 17th day of said month of February, from the said James West to one Sarah M. McDonell." This deed passed the equity of redemption in the lands in the mortgage, which were 75 acres, notwithstanding the misrecital here of 70 acres; for what was clearly purported to be disposed of was the land comprehended in the mortgage, and all West's interest therein. By deed, dated 11th August, 1865, French conveyed to John S. Brown part of the west-half of the lot No. 5 by the same description as is contained in the Sheriff's deed to himself. When, then, Sarah M. McDonell, on the 19th March, 1867, assigned West's mortgage to the same John S. Brown, he was seised of all the estate which West had purchased, and the taxes paid by West and Brown constituted, undoubtedly, in my judgment, taxes paid by the tax purchaser within the meaning of the Act since the sale and prior to the 1st November, 1869.

I do not see anything in the objection that the tax purchaser should shew that the taxes he paid were only taxes which had been legally imposed. What the Act says shall protect him is, the payment of at least eight years' taxes "*charged*" on the said lands. It matters not, as it appears to me, whether they were legally or illegally imposed: if the tax purchaser has paid eight years' taxes *charged*, the intent of the Act is to make such payment equivalent to the four years' occupation mentioned in the first section.

The rule, therefore, must be discharged.

HAGARTY, C. J., concurred.

Rule discharged.

BANK OF MONTREAL V. DAVY ET AL.

Promissory note—Equitable plea—Right of surety to call on creditor to realize collateral securities.

To an action on a promissory note the defendant, an indorser, pleaded "that he indorsed the note as surety for the makers: that it was agreed that the makers should transfer to the plaintiffs, as surety for the payment of the note, by way of mortgage, a certain schooner, and that the plaintiffs agreed to hold the said vessel for the benefit and indemnity of the defendant: that in pursuance of such agreement the vessel was assigned to the plaintiffs, and *it thereby became the duty* of the plaintiffs, when requested by the defendant, to sell the vessel, under a power of sale contained in the mortgage, for the benefit of the defendant: that the defendant requested plaintiffs to sell said vessel: that the plaintiffs refused and neglected to comply with such request, and that the vessel was subsequently lost, whereby the defendants lost the benefit of the security of the said vessel:

Held, that if the plea intended to assert that wherever a creditor takes a mortgage from a principal debtor with power of sale, accompanied with the personal obligation of a surety, it becomes an imperative duty imposed upon the mortgage creditor, upon the request of the surety, at any time to sell the mortgaged property upon any default committed, at the peril, if he does not do so, of losing the benefit of the contract of suretyship, such proposition cannot be sustained in law; and that if the defendant intended to rely on an express agreement to this effect, the evidence would not sustain such contention.

ACTION upon a promissory note, dated the 10th May, 1867, whereby Davy and Peterson promised to pay, on the 1st day of December, 1869, to W. H. Davy, junior, or order, at the Bank of Montreal, Kingston, the sum of \$2407.38, with interest at 7 per cent. The note was endorsed by the payee and one John Stevenson. The question arose upon a plea upon equitable grounds, by defendant John Stevenson, who pleaded that "he endorsed the note as surety for Davy and Peterson, the makers, and that at or about the time when he so endorsed the note the said Davy and Peterson agreed to have transferred by way of mortgage a certain schooner, called the 'Thomas Downey,' to the plaintiffs, as security for the payment of the said note, and which vessel the said plaintiffs agreed with the defendant John Stevenson that they would hold for the benefit and indemnity of him the said John Stevenson, as such endorser, and the said Davy and Peterson afterwards did duly assign the said vessel to the said plaintiffs, who

duly received the assignment of the said vessel and became the lawful owners thereof as mortgagees, and the plaintiffs then became and were bound to enforce the said mortgage security by the sale of the said schooner under a certain power of sale contained in the said mortgage, or by such other means as the said plaintiffs could lawfully take for that purpose, and apply the proceeds towards the satisfaction of the plaintiffs' claim upon the said promissory note, whenever requested so to do by the defendant John Stevenson; and after endorsing the said note and when the said mortgage was in default, and when plaintiffs might and could have lawfully enforced the said mortgage security by the sale of the said vessel *under the said power of sale*, or by other lawful means, the said John Stevenson requested the plaintiffs to enforce the said mortgage security by the sale of the said vessel, and all things happened and all conditions were fulfilled necessary to entitle the said John Stevenson to have the said vessel sold by the plaintiffs, and the plaintiffs might and could have realized by the sale thereof sufficient to have satisfied the whole of the plaintiffs' claim on the note in the declaration mentioned; and the plaintiffs then wholly refused and neglected *their duty in that behalf*, and refused and neglected to enforce the said mortgage security by the sale of the said vessel, and afterwards the said vessel was wholly lost and destroyed, and the security and indemnity thereof had been wholly lost to the said defendant, John Stevenson; whereby the said John Stevenson, by reason of the premises, was discharged from all further liability to the plaintiffs."

Issue.

The trial took place before Galt, J., at the Spring Assizes, at Kingston. The defendant, Stevenson, was called as a witness on his own behalf. From his evidence it appeared that before he endorsed the notes the Bank already held the vessel in the name of another person, in trust. They had also security upon other property of Davy, one of the makers of the note, and the defendant

Stevenson went to the Bank to endeavor to get a settlement for Davy of the claims of the Bank against him. Witness said that he called upon Mr. Moore, the agent of the Bank, for this purpose, and that he told Mr. Moore that it was not intended to hold the vessel any longer than until a suitable purchaser could be found for her at a reasonably fair price, and that if he should endorse Davy and Peterson's notes, he wished, as soon as a purchaser could be found, to have the vessel sold; and that if Mr. Moore would give Mr. Davy what he, Stevenson, thought was sufficient time on his notes, with that privilege, he would endorse; that Mr. Moore replied "that we should have the privilege of having the vessel sold at any time, and of having the price applied on the notes." There was then an arrangement made as to the time which should be given by the Bank. This was the only interview which the defendant Stevenson had with Mr. Moore; but a few days afterwards he received a letter from Mr. Mowat, as Solicitor of the Bank, which was as follows:—

"Dear Sir,—I send herewith *a mortgage by Davy and Peterson to you*, on the property held by the Bank of Montreal as security for D. and P.'s liabilities. On consideration, I thought this the simplest and most effectual way of giving you the security you asked. The Bank also holds a lien on the schooner 'Tom Downey,' and will continue to hold it for the notes you are to endorse to replace the present liabilities. The vessel is now in the name of Thomas Downey as owner, as trustee of the Bank, after paying himself his own advances. These advances will be paid off by the notes you endorse, and therefore the whole vessel will be held by him to secure the notes endorsed by you. I think the form of the security had then better be altered and Downey asked to convey the vessel to D. and P., and a mortgage back to the Bank taken from them to secure these notes."

This letter being read, Mr. Stevenson said that it was on this arrangement alone he endorsed the notes (three in number, of which the one sued upon was the last). He said

that he did not endorse the notes until after he had received that letter. He sent no answer to the letter. He considered Mr. Mowat's letter as an assurance that the Bank would hold the vessel as his security for the payment of the notes. The letter, he said, was satisfactory to him as far as the lien on the vessel was concerned, but it did not contain the agreement about the sale of the vessel at his request; and although he said he was not satisfied with the letter, as containing all that had taken place with Mr. Moore, yet he did not call any other person's attention to the omission, nor had he any conversation with Mr. Moore on the subject. The arrangement suggested in Mr. Mowat's letter appeared to have been carried out shortly after the date of the notes (namely, the 10th May, 1867,) by an assignment of Downey's interest in the vessel to Davy and Peterson, so as to vest the ownership of the vessel in them; for, although no deed to that effect was produced, a mortgage was produced, dated the 23rd May, 1867, whereby Davy and Peterson conveyed the vessel to the Bank, with power to the Bank, in the event of default being made by Davy and Paterson in payment of the three notes endorsed by Stevenson, to sell the vessel, and upon trust to apply the proceeds in payment, firstly, of costs, charges, and expenses, and secondly, in payment of so much of the notes as should be due and unsatisfied. This mortgage was duly registered in the Kingston Custom House (where the vessel was registered) on the 8th June, 1867. It further appeared in evidence that about the time the second note became due, namely, the 1st December, 1868, one Andrews was desirous of purchasing the vessel for \$4,500, of which \$2,000 only should be paid in cash, and the balance on time, but at the expiration of what time was not stated. This offer being made, Mr. Stevenson said that he sent Mr. Peterson to Mr. Moore, but he did not himself call upon or see Mr. Moore. Peterson said that he called on Mr. Moore in pursuance of Mr. Stevenson's instructions. Peterson said: "I told him that we were desirous of providing for the second payment, and that an

offer had been made for the vessel of \$4,500, and that \$2,000 would be paid in cash, which would enable us to meet the second payment, and the balance would go to meet the next note. Mr. Moore refused to change the papers unless our whole debt was paid. I then asked Mr. Moore to sell her himself, but he did not do it: he said that if we would pay our debt we might do as we pleased with the vessel." Mr. Stevenson said that he subsequently requested Mr. Davy to go to the Bank. Mr. Davy said that he did go to Mr. Moore in the spring of 1869, and told him of the offer from Mr. Andrews of \$4,500. At this time there were \$1,500 over-due on the second payment. He wanted Mr. Moore to release the vessel and all the rest of the property held by the Bank, upon receiving payment of the balance then due and taking security on the balance of the purchase money of the vessel on the other note. He refused, unless the notes were paid in full, to make a title to the vessel. At the time the notes were endorsed, Mr. Moore said that he would release any part of the property sold, provided the Bank received the purchase money. About two months after this conversation, about the proposed sale of the schooner, she was lost, and was not insured."

Upon this evidence a verdict was taken for the plaintiffs for \$2,875.42, and leave was reserved to the defendant, Stevenson, to move to enter a verdict for him, on the equitable plea, if in the opinion of the Court, who should be at liberty to draw inferences as a jury should, the verdict should be so entered.

In Easter Term, *M. C. Cameron*, Q. C., obtained a rule to shew cause why the verdict should not be set aside and a verdict entered for the defendant Stevenson, pursuant to the leave reserved, or for a new trial.

Anderson (*Geo. McDonald* with him) shewed cause, citing *Strange v. Fooks*, 4 Giff. 408.

M. C. Cameron, Q. C., contra, cited *Watson v. Allcock*, 1 S. & G. 319, S. C. 4 De G. M. & G. 242; *Watts v. Shuttleworth*, 5 H. & N. 235.

GWYNNE, J., delivered the judgment of the Court.

It is unnecessary to discuss the points of the rule relating to a new trial, leave being reserved to enter a verdict for the defendant if the Court, drawing such inferences a jury properly should draw, should be of opinion that the equitable defence has been established, and that the defendant upon the evidence is entitled to a verdict. The defence which the plea appears to profess to offer is either the contention that, whenever a creditor takes a mortgage from a principal debtor, with a power of sale accompanied with the personal obligation of a surety, it becomes an imperative duty imposed upon the mortgagee creditor, upon the request of the surety, at any time to sell the mortgaged property before any default committed, at the peril, if he does not do so, of losing the benefit of the contract of suretyship, or an allegation that there is *expressed* in the power of sale contained in the mortgage precise authority to the mortgagee, and an undertaking by him to sell upon the request of the surety at the like peril, if the mortgagee refuses or neglects to comply with such request, of losing the benefit of the contract of suretyship. The former of these propositions is not sustainable in law, nor is the latter in fact. As the case was argued before us the defendant's right to have a verdict entered for him was pressed upon this, that, as is contended, the evidence shews that the defendant only consented to endorse the paper in question upon the express promise of the Bank that they would at any time, upon the defendant's request, sell the mortgaged property. Viewing the case in the light of this contention, and for the present assuming that such contention is what is asserted by the plea, being called upon to draw such inferences as a jury should draw, I am forced to arrive at the conclusion, that whatever may have in fact passed between the defendant and Mr. Moore, and however the defendant may have understood his rights arising out of what did so pass, we must take it, after Mr. Mowat's letter, and the security given which is therein referred to, and after the execution of the mortgage to the Bank of the

23rd of May, that the defendant adopted the mode of security which Mr. Mowat provided for him in lieu of any suggested by himself in his interview with Mr. Moore. As I understand the defendants' evidence, the only security which he says he largained for with Mr. Moore, was the right now insisted on of compelling the Bank at any time, upon his request, to sell the mortgaged property. Now Mr. Mowat's letter, without stating in terms what security it was that the defendant had asked, informs the defendant that, on consideration, he thought the simplest and most effectual way of giving him the security he asked for was to procure him the mortgage which he transmitted to him executed by Davy and Peterson upon property of theirs, which I understand to be real property, and he assures the defendant that the Bank will continue to hold also a lien upon the schooner Tom Downey for the notes to be endorsed by Stevenson, and suggests an arrangement, which appears subsequently to have been carried into effect on the 23rd May, that Downey shall release or reconvey to Davy and Peterson the schooner, and that they shall then mortgage it to the Bank. The defendant being satisfied with this arrangement endorses the notes: under these circumstances I think we must hold that the defendant abandoned then all claim to the special interest asserted in the schooner of having it sold for his benefit, and upon his request. I confess, also, that the manner in which it appears that Stevenson, instead of making the request himself upon the Bank to sell the schooner, as a demand for the fulfilment of the alleged contract, upon the faith of which he had endorsed, sent, as he says, Peterson and Davey to Mr. Moore to communicate Mr. Andrews's offer, shews that he regarded his position in this light, and that he treated the matter rather as an affair of Davy and Peterson, than of him and Stevenson, to get the Bank's consent to sell to Andrews. It may be questionable whether, assuming it to be clear that the Bank had agreed to sell whenever requested by Stevenson, and to apply the proceeds in payment of their claim, a sale

upon credit, such as that proposed to Andrews, would be a sale that, in the terms of such an agreement, the Bank could be compelled to accede to ; but I prefer to rest my judgment upon this, that the inference to draw from the evidence is, that the defendant concluded finally to accept the security as provided by Mr. Mowat, and so to become entitled only to the security upon the schooner as a surety, paying his principal's debt, becomes entitled to the benefit of all securities held by the creditor.

Rule discharged.

CORRIE ET AL. V. CLEAVER ET AL.

Action by husband and wife—Distress upon wife's goods—Evidence—Married Woman's Act.

A woman had been long in possession of chattels said (but not proved) to have been left to her by her deceased husband, and using them with her children. She then married the co-plaintiff. These goods were seized by a creditor of his on a claim alleged to be for rent, but not proved:

Held, that her title before marriage was *prima facie* sufficient, and after her second marriage the goods were protected, under the Married Woman's Act, against her second husband's creditors.

APPEAL from the County Court of the County of Brant, being trover for seizing the female plaintiff's goods, for rent due by her husband, and for converting same.

Pleas. Not guilty, and goods not female plaintiff's.

Issue.

The female plaintiff was examined at the trial, and stated she had been married to the co-plaintiff for upwards of three years: that the goods in question were hers, and were seized at her brother's-in-law, being so seized and sold during her husband's absence from home: that she forbade the bailiff selling them, telling him they were not her husband's, and offering to point out what were hers: that the goods had been willed to her by her former husband, and had always been in her possession.

The will, of which no probate had been granted, was produced, but was objected to. It was then withdrawn,

as the learned Judge doubted as to his jurisdiction to proceed with the case. The wife further proved that the goods had been in her possession during her widowhood, and were so when she married again.

A son of the female plaintiff was also called, and corroborated her as to the possession of the goods. It was further shewn that her children by her former husband lived with her, and used the goods also.

It was objected that the plaintiffs could not recover, as the evidence shewed the title to the goods to be in the next of kin of the former husband of the female plaintiff: that her title was only possessory, and the action should have been by her present husband alone: that the property was shewn to have been in her actual possession and that of the children: that the wife must have an absolute title to maintain her action.

Evidence was then entered into on the part of the defence, not necessary, however, to be stated.

The learned Judge charged the jury that if they believed the evidence of plaintiffs, and that the goods were not the male plaintiffs, then the wife was in possession of them when alleged, claiming them as her own, and that she could maintain this action against any wrong-doer, such as the defendant.

This charge was objected to on the same grounds as above, with the additional contention that the jury should have been told that, while living with their mother, the possession of the children and hers was a joint one, and she could not recover.

The jury found for the plaintiffs, \$80 damages.

In the following County Court Term a rule *nisi* was obtained to enter a nonsuit on the ground of the absence or insufficiency of evidence that the goods were the female plaintiff's; or for a new trial, for misdirection in not directing that plaintiff was not entitled to recover, or, at any rate, for more than one-third of the goods.

This rule was, after argument, discharged, when the defendant appealed on the same grounds as taken in the Court below.

McCulloch, for the appeal, cited *Kraemer v. Gless*, 10 C. P. 470 : *Lett v. Commercial Bank*, 24 U. C. 552 ; *Leys v. McPherson*, 17 C. P. 226.

Harrison, Q. C., contra.

HAGARTY, C. J., delivered the judgment of the Court.

As I understand the evidence, there was no attempt made to justify the seizure and sale of the goods, and the defendants, even as against the husband, would apparently be wrong-doers. Had the suit been brought by the female plaintiff alone, while the widow of Peat, I think her possession and use of the chattels would make out a *primâ facie* case. She says, in her evidence, the goods were her own, willed to her by her former husband. On defendants' objections, the will is not received in evidence. Her son, William Peat, confirms her general title and possession. We think it lay on defendants to give evidence to contradict this *primâ facie* right.

Then, as to the effect of the Married Woman's Act. Assuming that she owned the good when she married Cleaver, then, she is to hold them "free from the debts and obligations of her husband, and from his control or disposition without her consent, in as free and ample a manner as if she continued sole and unmarried."

After the several decisions of our Courts on this Act, such as *Lett v. Commercial Bank* (24 U. C. 552) ; *Leys and wife v. McPherson* (17 C. P. 266) ; *In re Linden and wife v. Buchanan* (29 U. C. 1) ; *Scouler v. Scouler* (19 U. C. 106) ; *Wright v. Gaudeas* (28 U. C. 609) ; *Kraemer v. Gless* 10 C. P. 470), it is useless to open the discussion as to the wife's right to hold the property free from the husband's debts, &c. The Judges have, at different times, expressed their views thereon, and it is unnecessary to do more than refer to the cases.

That many frauds, not previously practicable, may be committed under the colour of this Statute, may be quite true. We have only to deal with the plainly expressed will of the Legislature, however opposed that may be to

some of our strongest views as to the wisdom of the common law so largely superseded by this Statute.

The evidence, we think, was sufficient to entitle plaintiffs to a verdict. The learned Judge's ruling seems correct, and the appeal must be dismissed with costs.

Appeal dismissed.

MEMORANDA.

During this Term the following gentlemen were called to the Bar:—JOSEPH TIMOLEON ST. JULIEN, HENRY FRANCIS HOLLAND, EDWARD BURNS, GEORGE ANTHONY BOOMER, FRANCIS ARNOLDI, CHARLES ALLAN BROUGH, DOUGLAS SHELDON SMITH, DAVID LYNCH SCOTT, WILLIAM JOHN GREEN, FREDERICK GEORGE AUGUSTUS HENDERSON, WALTER MATHESON, DANIEL WADE, JAMES HOLMES MACDONALD, MICHAEL HOUSTON, EDWARD HANDLEY SMYTHE.

IN THE COURT OF ERROR AND APPEAL.

THE ST. CATHARINES, THOROLD, AND SUSPENSION BRIDGE
ROAD COMPANY (RESPONDENTS) V. GARDNER (APPELLANT) (a).

Road Co.—Road running partially through town—Right to collect tolls within limits of town.

A joint stock road company had begun operations and were in receipt of tolls several years before the town of Clifton was incorporated, within which part of the road ran: *Held*, affirming the judgment of the Court of Common Pleas, 20 C. P. 107, that the company had the right to levy tolls within the town limits, notwithstanding the incorporation, and that some of the toll-gates were within the town limits.

APPEAL from a judgment of the Court of Common Pleas, reported in 20 C. P. 107, where the plaintiffs are misnamed "The Corporation of the Town of St. Catharines," and where the facts of the case are fully stated.

The grounds of appeal were: 1. The plaintiffs had no right to levy and collect tolls within the limits of the town of Clifton, against the will of the corporation of the town. 2. So much of the road in question as was situate within the limits of the town of Clifton was a public road, vested in that municipality, subject to any rights in the soil which the individuals who laid out the road reserved.

Harrison, Q.C., for the appellant. The policy of the law is against road companies having toll-gates within cities, towns, or villages. The town of Clifton was not incorporated when the road in question was made.

M. C. Cameron, Q.C., contra. 13 & 14 Vic. applies to roads in cities and towns, which roads belonged to private

(a) Argued June 30, 1870, before Draper, C. J. of Appeal, Richards, C. J., Spragge, C., Morrison, J., Gwynne, J., Galt, J., Strong, V. C.

owners, but was never intended to apply to roads constructed under the Company's Act. The company cannot, without express words, be divested of the right it had acquired of maintaining the road. The Municipal Act, sec. 331, shews that the Legislature did not contemplate that there should never be toll collected in a town.

The cases and Statutes cited in the Court below were again referred to.

DRAPER, C. J. OF APPEAL, (12th January, 1871).—The plaintiffs are a joint-stock road company, formed in March, 1851, under the statute since consolidated by the Consol. Stat. U. C. ch. 49. They constructed their road, along the bank of the Niagara River, from the Suspension Bridge to Table Rock, at the Falls of Niagara.

The town of Clifton was, after that construction, incorporated by the Statute of Canada, 19 Vic. ch. 63 (1856).

The plaintiffs erected toll-gates and collected tolls on their road before Clifton was incorporated, and thenceforth continued to collect tolls until the defendant destroyed one of their gates and toll-houses, in consequence of which this action was brought. This gate, &c., was within the incorporated limits of the town of Clifton, and the defendant justifies the act as their officer, acting under their authority.

The question is, whether the plaintiffs could rightfully collect tolls within the limits of the town of Clifton, against the will of that municipality.

Two cases were cited: *The Port Whitby Road Co. v. The Town of Whitby* (18 U. C. 40), and *Regina v. Brown and Street* (13 U. C. C. P. 356). In the first the question was whether the plaintiffs or the defendants were liable to repair a portion of a road lying within the limits of the town of Whitby. The road had originally been constructed by the Government, and had been transferred to the plaintiffs by order in Council, under the Statute of Canada, 12 Vic. ch. 5, secs. 12, 13. The Court held that under the 13 & 14 Vic. ch. 15, sec. 1, the town was liable for the improvement. In the other case, the effect of the decision

was that roads constructed by road companies, incorporated according to law, were not, by force of the Acts relating to municipal institutions, transferred, as to liability to repair, to cities or incorporated towns.

In the present case the Court of Common Pleas followed the last decision, which was also in that Court.

The question now for determination is whether, upon the incorporation of a town, such portions of a road which had been previously constructed by a duly incorporated road company, as were included within the limits assigned to the newly incorporated town, are transferred to, and placed exclusively under the control of, the municipality, depriving the road company of its property in the road, of its right to collect tolls, and relieving it of its duty to keep the road in repair.

The respondents were incorporated under the Statute 12 Vic. ch. 84, which, by sec. 19, vested in them the road and all materials provided from time to time for constructing or maintaining the same, and all toll-houses, gates, and other buildings, constructed or acquired by them under the provisions of the Act. It is true this Act was repealed by 16 Vic. ch. 190 (passed 14th June, 1853,) but all companies formed under its provisions were continued and perpetuated, and the provisions contained in the latter Act were extended to such companies, the twentieth section thereof being in substance the same as the nineteenth section of the repealed Act.

The first general Act respecting municipalities was passed in the 12th Vic. (ch. 81). The 31st sec. by sub-sec. 17, as amended by 13 & 14 Vic. ch. 64, schedule A. No. 5, recognizes in general terms the continuing right of incorporated road companies to levy tolls. The next sub-section authorizes municipalities to take stock in incorporated road companies, in whose road the inhabitants of the respective municipalities are sufficiently interested to warrant such taking of stock; and the 191st section provides for the passing of by-laws by the municipalities to authorize persons to contract with them to make roads or build

bridges, such as the municipalities themselves had a legal right to make or build, and to grant to such persons tolls (to be fixed by by-law), to be levied on such road or bridge, the duty of repairing being imposed upon those persons, while on the other hand, *road companies are restrained from interfering with them.*

The last Municipal Act, 29 & 30 Vic. ch. 51, sec. 333, sub-sec. 2, authorizes municipal councils to raise money by tolls on bridges, roads, or other works, to defray the expenses of making and repairing the same; and the seventh sub-section affirms the legality of toll-roads constructed by incorporated road companies; and this section applies to all townships, counties, cities, towns, and incorporated villages; while sub-sec. 9, which is but a re-enactment of a former provision, is directly opposed to the argument of the appellants, that the policy of the law is adverse to the maintenance of toll-gates within the limits of any city, town, or incorporated village; for it authorizes the municipal councils to grant for a limited term to any person, in consideration, or part consideration of planking, gravelling, or macadamizing a road, or building a bridge, the tolls fixed by by-law to be levied on the work.

Still the claim asserted by the appellant appears at first view to be sustained by the 13 & 14 Vic. ch. 15, which was in force when the respondents were incorporated as a road company. This Act was afterwards repealed, but its provisions were re-enacted in 22 Vic. ch. 99, and form part of the last Municipal Act. The 13 & 14 Vic. ch. 15, after reciting the expediency of removing all doubt on certain points with regard to the roads and highways within the limits of the several cities and incorporated towns in this province, enacts that the "right to use, as public highway, all roads, streets, and public highways within the limits of any city or incorporated town in this province (with certain exceptions not touching the present case), shall be vested in the municipal corporation of such city or incorporated town; and such roads, streets, and highways, shall be maintained and kept in proper repair so long as

they shall remain open as such, by and at the cost of the corporation." This language is somewhat peculiar. The enactment that *the right to use*, as public highway, certain roads, streets, and public highways, shall be vested in the municipal corporation, is scarcely accurate in expression; nor is it at all clear, from that enactment, what were the doubts it was intended to remove. In its corporate capacity, it does not readily appear how the municipal corporation could enjoy the right to use; while it is plain that these words were not meant to pass the soil and freehold of the roads, &c. Every subject has the right to use all public highways, whether within or without corporate limits. Certainly it would be a strong, and, in my humble judgment, a forced construction to hold that this language operated to divest road companies, formed under an Act which received the royal assent on the very same day as the Act respecting municipalities (12 Vic. ch. 81), of the property and rights vested in them by ch. 84 of the same session. The 13 & 14 Vic. ch. 14, extends the application of the Road Companies Act to companies formed for the purpose of acquiring any public road, &c., which might be lawfully transferred to such company under the provisions of 12 Vic. ch. 5. Again, 16 Vic. ch. 190, which consolidated the previous Road Companies Act, in sec. 20, repeats the provision; and sec. 60 of the Consol. Stat. U. C. ch. 49, re-enacts it; and the 18 Vic. ch. 139, distinctly recognizes the rights of road companies within, as well as without, the limits of cities and towns.

Then the Legislature placed in the same statute (22 Vic. ch. 99) the apparently incongruous provisions as to the rights of incorporated companies, and subsequently repeated both in the Municipal Act, 29 Vic. ch. 51. This is a plain declaration of an intention that the two should stand together, and it is, therefore, our duty to construe them not as conflicting, but as consistent with each other; and this can, I think, be best accomplished by holding that the roads constructed by duly incorporated road companies are not to be considered as public highways within the

purview and intention of 13 & 14 Vic. ch. 15, or any of the subsequent re-enactments of its provisions.

In my opinion, therefore, this appeal should be dismissed with costs.

GWYNNE, J.—In the *Port Whitby and Lake Scugog Road Company v. The Town of Whitby* (18 U. C. R. 40) it was decided by the Court of Queen's Bench that, by the 13 & 14 Vic. ch. 15, the duty of maintaining in repair a portion of a macadamized road, sold by the Government to the road company before the incorporation of the town of Whitby, under 13 & 14 Vic. ch. 14, became imposed upon the town upon its being incorporated, and ceased to be an obligation upon the road company.

In *The Queen v. Brown and Street* (13 C. P. 356) it was decided that a portion of the St. Catharines, Thorold, and Suspension Bridge Road, passing through the village of Thorold, was not vested in the corporation of the village, but in the road company, and that therefore Brown and Street, to whom the road had been sold, were liable to keep it in repair.

In the present case now before us the Court of Common Pleas followed the decision in *The Queen v. Brown and Street* as a decision upon the very point in issue in this case. The Court, in giving judgment in *The Queen v. Brown and Street*, held that the roads of joint stock companies are not public roads or highways within the meaning of 22 Vic., ch. 54, sec. 336, and that 13 & 14 Vic., ch. 15, was repealed by 22 Vic., ch. 99, and they add that in the *Port Whitby and Lake Scugog Road Co. v. The Town of Whitby* the attention of the Court of Queen's Bench was not drawn to the fact of this repeal. But Robinson, C. J., in the latter case, when delivering the judgment of the Court, says, "We see nothing in 16 Vic., ch. 190, or in the Municipality Act, 22 Vic., ch. 99, that should be allowed to affect the question raised in this case." We cannot but see, therefore, that these cases are in direct conflict with each other; and that the question for decision

upon this appeal is, which of them correctly enunciates the law? It will be necessary for us, therefore, carefully to compare the provisions of the several Statutes which bear upon the point, the point in contention being that, as the defendant contends, immediately upon a city, town, or village becoming incorporated, so much of a road previously thereto legally constructed and established under the Road Companies Act as shall be within the limits by the Act of Incorporation assigned to such city, town, or village, becomes *ipso facto* vested in the city, town, or village, freed from all interest of the road company therein, although, before the village, town, or city came into existence, such portion of road was legally vested in, and was the property of, the road company; whereas, on the contrary, the plaintiffs contend that all the rights and interests acquired by them prior to the incorporation of such city, town, or village, continue to remain and are vested in them until so much of their road as shall be within the limits assigned to the city, town, or village, shall be purchased by the municipal corporation within which it is so situate.

The first Joint Stock Road Companies Act, 12 Vic., ch. 84, became law upon the 30th May, 1849. By that Act all road companies were empowered to construct their roads in counties and townships without the assent of the municipalities being first obtained, except in the case of twelve freeholders, resident within half a mile of any proposed road, giving notice to the company that they intend to oppose the formation or improvement of any such projected road: sec. 2. But with respect to cities, towns, and villages, it was provided that no such road shall be constructed or pass within the limits of any city or the liberties thereof, or within the limits of any incorporated town or village, except by special permission under a by-law of such city, town, or village, to be passed for that purpose. By the 26th section of that Act all municipal corporations were empowered to take stock in companies formed under the Act, and also from time to

time to sell and transfer such stock; and in respect of stock so taken it was enacted that the mayor, warden, or other chief officer of the municipality, should be deemed a stockholder in the company, and should vote as such, subject to such rules and orders in relation to his authority as shall be made in that behalf by such municipality by by-laws or otherwise; and by section 28 it was enacted that, after twenty-one years from the time of completing any such road, the municipal authority representing the interests of the locality, through or along the boundary of which any such road should pass, might purchase the stock of the company at its current value, to be ascertained by arbitrators in case of difference, and that thenceforth all the rights and powers of the company should be vested in, and exercised by the municipality purchasing. This Act related to, and was in force in Upper Canada only, an Act of the same session, ch. 56, having been passed in relation to joint stock companies for the construction of roads in Lower Canada.

At the time of the passing of this Act there were about fourteen incorporated road companies authorized to levy tolls upon the roads which they had been authorized to construct. Many of these roads were authorized to be constructed upon and along original allowances for road. There were also several other roads upon which tolls were authorized to be collected, which had been macadamized by moneys granted by the Legislature upon the security of the tolls. These roads were under the control of trustees appointed by the respective Acts authorizing the works. And there were also other macadamized roads upon which tolls were collected, and which, by 9 Vic., ch. 37, were placed under the control of the Board of Works. With respect to these latter, the Statute 12 Vic., ch. 4, was passed to regulate the tolls to be collected upon them, and with respect to these roads it was provided by 12 Vic., ch. 5, sec. 12, that it should be lawful for the Governor in Council to enter into arrangements with any of the municipal or district councils, or other local corporation or

authorities, or with any company incorporated for the purpose of constructing or holding such works, for the transfer to them of any of the public roads, harbours, bridges, or public buildings, which it may be found more convenient to place under the management of such local authorities or companies, and, on the completion of such arrangements, to grant, and by so granting to transfer and convey for ever, or for any term of years, all or any of such roads, &c., &c., to the district or municipal council, or other local authority or company with whom such arrangements may have been made, and upon such terms and conditions as may have been agreed upon, and that all moneys payable to the Province under the terms of any such grant shall be carried to the credit of the sinking fund and form part thereof; and by the 13th section it was provided that all powers and rights vested in the Crown or in the Governor in Council, or in any officer or department of the Provincial Government, with regard to the public work thereby granted, should be vested in the grantee to whom the work itself is thereby granted.

In the same Session of Parliament the Municipal Corporations Act, 12 Vic., ch. 81, was passed. By that Act the several counties, townships, cities, towns, and villages in the Province were erected into municipal corporations, with certain defined powers applicable to each. By the 31st section of that Act, sub-sec. 17, as amended by 13 & 14 Vic., ch. 64, township councils were empowered to regulate the manner of granting to associated joint stock road or bridge companies, *to which opposition has been made in accordance with the provisions of the Act passed in the present Session of Parliament, intituled, "An Act to authorize the formation of joint stock companies for the construction of roads and other works in Upper Canada,"* permission to proceed with any roads or bridges within the jurisdiction of any such municipality, and the manner of afterwards ascertaining and declaring, according to law, the completion of the works undertaken by such companies respectively, so as to entitle such incorporated companies

to levy tolls upon such works; and every city, town, incorporated village, county, and township council were authorized to take stock in any such joint stock road company. They were also "empowered to authorize by by-law any person or persons, who may be willing to contract with them for that purpose, to plank, gravel, or macadamize any road which such municipal corporation would themselves have a right to plank, gravel, macadamize, or build, and to grant to such person or persons the tolls to be levied on the same after it shall have been completed, such tolls to be fixed by by-law of such municipal corporation, provided that it should be the duty of such person or persons, during the period that his or their right to levy tolls under such by-law should continue, to keep and maintain such roads in repair," and provided also, that none of the powers and privileges conferred by an Act passed in this present Session of Parliament, intituled 'An Act to authorize the formation of joint stock companies for the construction of roads and other works in Upper Canada,' shall extend to confer upon any company formed or pretended to be formed under the authority of that Act any power of interference with any authority conferred by any such by-law upon any person or persons under the authority of this section."

In this section we observe, as might be expected in an Act of the Legislature, a jealous preservation of acquired rights, even as against an Act of the Legislature, which, it would seem to have been feared, might have been construed, but for this last proviso to this section, to authorize an interference with acquired rights; and we observe, also, provision made for enabling cities, towns, and villages, to construct, and to procure to be constructed, roads within their respective municipalities upon which tolls should be collected; so that it does not appear at all to have been, as was contended for by the appellant, contrary to the policy of the Acts of the Legislature, that there should be toll roads within the limits of cities or towns.

Upon the 16th day of August, 1850, the Acts 13 & 14

Vic., chs. 14 and 15, were passed, the former for the purpose of enabling companies formed under 12 Vic., ch. 56, in Lower Canada, and under 12 Vic., ch. 84, in Upper Canada, to acquire public works under 12 Vic., ch. 5. By this Act it was provided that in the case of a toll road being sold to such company, the maximum toll to be collected after the sale should be that authorized by 12 Vic., ch. 4, and that the company purchasing should keep the road in repair, and that no sale should be made without reserving to the government the power of resuming the road at any time after the expiration of a period named, not exceeding ten years; and it was further provided that no company, to be formed for the purpose of acquiring any such road, should be liable to be opposed or prevented from acquiring such work, or from using and working the same, by any municipal council, notwithstanding 12 Vic., chs. 56 and 84, nor shall the company be bound to make any report respecting such work to any municipal authority, but the provisions of the said Acts respectively, as to such opposition and prevention, or to such report, shall apply only to the extension of the same beyond the local limits of the work when transferred to the company.

Now, by this Act we find express provision made to the effect that no municipal council shall have any power of interference with, or control over, a toll road sold by Government to a company formed for the purpose of acquiring it. As to companies *constructing* roads under 12 Vic., ch. 84, that Act secured to those companies the right of enjoying the benefit of their capital expended in constructing the road by levying tolls upon it when constructed. Other road companies, specially incorporated, had secured to them by their special Acts of incorporation the right of levying tolls upon the roads which they had expended their capital in constructing.

The first question, then, which presents itself for our consideration is, was the 13 & 14 Vic., ch. 15, passed for the purpose of nullifying, for the benefit of the inhabitants of cities and towns, all the rights which those respective

companies had so acquired in respect of their capital invested in making roads in cities and towns? and had it such effect in respect of a road sold by the Government, notwithstanding the express provision in 13 & 14 Vic., ch. 14, above cited?

13 & 14 Vic., ch. 15, was intituled, "An Act to make better provision with regard to the repairing roads within the limits of incorporated cities and towns, and of roads and bridges which, having been under the control of the Commissioners of Public Works, may hereafter be released from such control."

The preamble recites that, "Whereas it is expedient to remove all doubt on certain points with regard to the roads and highways within the limits of the several cities and incorporated towns in this Province, therefore be it enacted, that the right to use as public highway all roads, streets, and public highways, within the limits of any city or incorporated town in this Province, except in so far as the right of property or other right in the land occupied by the same highway may have been expressly reserved by some private party when it was first used as such road, street, or highway, and except as to any concession road or side road within any such city or town, where the persons now in possession, or those under whom they claim, may have laid out streets in such city or town, without any compensation therefor, in lieu of such concession or side road, shall be vested in the municipal corporation of such city or incorporated town, and such roads, streets, and highways, shall be maintained and kept in proper repair, so long as they shall remain open as such, by and at the cost of such corporation, whether they were originally opened and made by such corporation, or by the Government of this Province, or of either of the late Provinces of Upper or Lower Canada, or by any other authority or party; and if the municipal corporation of any such city or incorporated town shall fail to keep in repair any such road, street, or highway, within the limits thereof, such default shall be a misdemeanor, for which

such corporation shall be punished by fine, in the discretion of the Court before whom the conviction shall be had; and such corporation shall be also civilly responsible for all damages which may be sustained by any party by reason of such default, provided the action be brought within three months."

Now the contention is, that the words of this Act, namely, "the right to use as public highways all roads, streets, and public highways within the limits of any city or incorporated town in this Province, except," &c., &c., "shall be vested in the municipal corporation of such city or town," &c., &c., "and such roads, streets, and highways shall be maintained and kept in repair by and at the cost of such corporation, whether they were originally opened and made by such corporation, or by the Government of this Province, or of either of the late Provinces of Upper or Lower Canada, or by any other authority or party," are so comprehensive as to include all toll roads, however constructed, and consequently that the effect of the Act is to vest in any city or town, thereafter to be incorporated, all toll roads which should be within the limits assigned from time to time to such city or town, although such roads should have been previously legally constructed, either under a special Act or under 12 Vic., ch. 84, and although the whole of the road so constructed, which should be within such limits, should have been constructed on land acquired by purchase for the special purpose; and thus to give to such city or town, free of toll, the whole benefit of the capital which the road companies, upon the faith that they should enjoy under their Act of incorporation the benefit of their outlay, had expended in constructing the roads; and that the Act also, in like manner, vests in the city or town all roads which previously to the incorporation of such city or town, had been, for valuable consideration, sold by the government to a company under 13 and 14 Vic., ch. 14, notwithstanding the express provision therein contained, as above cited, to the contrary.

If this contention be correct, then, upon the same principle, it will follow that upon the passing of the Act, and by force thereof, the private property of a road company, incorporated under 12 Vic., ch. 84, who had constructed their road at great expense through a city or town upon the authority of a by-law for that purpose first had and obtained, in pursuance of the terms of 12 Vic., ch. 84, became transferred to and vested in the city or town without any consideration whatever paid therefor; for the words "*all roads, streets, and public highways, whether originally opened and made by such corporation, or by the Government of this Province, or of either of the late Provinces of Upper or Lower Canada, or by any other authority or party,*" are equally sufficiently comprehensive to include roads constructed by a company under 12 Vic., ch. 84, with the assent, granted by by-law, of the city or town through which it has been constructed; nay, it may with equal truth be said that the words are comprehensive enough to include a road macadamized by private persons at their own expense, upon the faith of a by-law of the municipality authorizing them to levy tolls in virtue of the powers conferred by the 191st section of 12 Vic., ch. 81. There can be no reason that I can see why the Act should not be held equally to affect, and only equally, all persons and companies who had acquired in due course of law authority to levy tolls upon roads constructed or purchased.

Now, can it be held that the Legislature contemplated divesting road companies of the rights and property legally acquired by them, without securing to them any consideration therefor, and without the consent of the companies? Such, certainly, is not the spirit of legislation, and it will require language from which there is no possibility of escaping to justify us in saying such was the intention of the Legislature.

That the Act does not affect such roads as had been macadamized at the expense of the Province and still remained under the control of the Board of Works is

apparent from the 2nd section of the Act, which enacts "that any public road or bridge, made, built, or repaired at the expense of the Province, and now under the management and control of the Commissioners of Public Works, may, by proclamation of the Governor, issued by and with the advice and consent of the Executive Council, be declared to be no longer under the management and control of the said Commissioners, and *upon, from, and after the day* to be named in such proclamation, such road or bridge *shall cease* to be under the management and control of the said Commissioners, *and no tolls thereafter* shall be levied thereon under the Act (12 Vic., ch. 4), but such road or bridge shall be under the control of the municipal authorities of the locality and the road officers thereof, in like manner with other public roads and bridges, and shall be maintained and kept in repair under the same provisions of law, which are hereby declared to extend, and shall apply to such road or bridge." Now here is a class of roads, "*made by the Government of this Province, or of the late Provinces of Upper or Lower Canada,*" which the second section of the Act declares shall not vest in the municipality unless nor until the roads of this class shall be transferred by the Government, by proclamation, to the municipalities in which they are. The Statute 13 & 14 Vic., ch. 14, had provided "that *no* company which should purchase from the Government any of the roads under the control of the Board of Works, should be prevented from using such work by *any* municipal authority, *nor shall any* municipal authority have the right of taking any such work *at the end of any* term of years." Now these two Acts were passed upon the same day, and the latter, namely, ch. 15, cannot, in my judgment, be construed to operate as a repeal of the former. Taken together, they seem to me consistently to provide that the Government may either sell the works to road companies, or surrender them to municipalities; that in the latter case they shall vest absolutely in the municipality, which shall be bound to repair them; but that, in the former case, no municipi-

pality shall have any control whatever over them, but that the purchaser shall enjoy the right to levy tolls, under 12 Vic., ch. 4, and shall be bound to repair.

Now, does or not subsequent legislation aid us in the construction which should be put upon 13 & 14 Vic., ch. 15?

The Statute 16 Vic., ch. 190, was passed upon the 14th June, 1853, "to amend and consolidate the several Acts for the formation of joint stock companies for the construction of roads and other works in Upper Canada." By that Act, sec. 20, it is re-enacted that *every* road constructed and acquired by or at the expense of any company acting under the provisions of this Act, and used for their benefit and convenience, shall be vested in such company and their successors. By the 25th section it was re-enacted that *any* municipality, without excepting cities and towns, having jurisdiction in the locality, through or along the boundary of which any such road may pass, or in which any such road is to be constructed, may take stock therein, and, by the 24th section, may loan money to such companies; and by the 25th section this *additional* provision is made, "That it shall be lawful for any company, to be constructed under the authority of this Act, or already constructed under the authority of *any* Act of the Legislature of this Province, whenever they shall see fit, to *sell* to any municipal authority, representing the interests of the locality through or along the boundary of which any such road shall pass, or in which the work shall be situate, and for such municipality, to purchase the stock of such company, *or any part of the road* belonging to such company, at the value that may be agreed upon between the company and the municipality, and to hold the same for the use and benefit of such locality, and such municipal authority shall, *after such purchase*, stand in the place and stead of the said company, and shall possess all such powers and authority as the said company shall have theretofore possessed and exercised in respect of such road or part of road.

The 28th and 31st sections enable the companies to

impose tolls, without restriction as to cities and towns. The 55th section confirms the title of all companies formed under 12 Vic., ch. 84, notwithstanding any irregularities in the formation; and by the 61st section all Acts and portions of Acts repugnant or inconsistent with the provisions of this Act are repealed.

Here we have the Legislature again, in 1853, declaring that road companies shall enjoy the benefit of all roads constructed by them, whether in townships, cities, or towns. We see no evidence whatever of any intention of the Legislature, as contended for by the appellants, that tolls should not be levied in cities or towns. There is no distinction made as to these municipalities. Provision is made *enabling* municipalities to *purchase* so much of a toll road as shall pass through or along the boundary of their limits, and *thereupon* the Act vests in the purchasing municipality the rights of the selling company, and among these rights that of themselves levying tolls. Now, if the Legislature was of opinion that by 13 & 14 Vic., ch. 15, cities and towns acquired without purchase a toll road constructed through or within their limits, is it possible to conceive that this provision, *enabling* all municipalities alike to become purchasers could have been inserted in the Act without any reference to the peculiar privilege which it is contended that 13 & 14 Vic., ch. 15, had given to cities and towns?

Then, again, we find 18 Vic., ch. 139, passed for the express purpose of extending to cities and towns specially the provisions of sections 23 and 24 of 16 Vic., ch. 190, as to all road companies, however formed, whether under that Act or by a special Act. The Act recites that, "Whereas it is expedient that the municipal corporations of cities and towns in Upper Canada should be authorized to assist with subscriptions for stock or loans of money the formation or construction of roads or bridges *within* or without such cities or towns, the making whereof will benefit the inhabitants, as well as those passing through or along the boundaries of such cities or towns; be it therefore enacted,

that all the provisions of sections 23 and 24 of 16 Vic., ch. 190, shall, in so far as respects the municipal corporations of cities and towns in Upper Canada, apply, and be construed to apply, to *all* cases of companies formed or to be formed under the said Act, *or heretofore chartered by any* Act of the Legislature for the formation of roads within or without such cities or towns." Now, if the Legislature regarded the 13 & 14 Vic., ch. 15, as vesting in the municipalities of cities and towns *all* roads, including toll roads, how is it possible to conceive that this Act, 18 Vic., ch. 139, could have been passed? or that there could have been all this preciseness of legislation enabling cities and towns to become stockholders in roads constructed within their limits, or to loan moneys to companies formed for the express purpose of constructing them, and enabling the city and town municipalities, by contract with the companies, to purchase the roads after they shall have been constructed, and authorizing the levying of tolls upon all roads so constructed, without exception as to the parts running through cities and towns, if the roads, by the act of being constructed through cities and towns, became, as to so much of the road as should be within the limits of the city or town, the property of the municipality and not of the company constructing the road, for this seems to be the conclusion to which the argument that 13 & 14 Vic., ch. 15 applies to toll roads must lead?

On the 16th August, 1858, the Legislature passed the Act 22 Vic., ch. 99, respecting the municipal institutions of Upper Canada. This is an Act in consolidation of the several laws in force relating to the municipal institutions of Upper Canada. In such an Act we would naturally look for a repeal of all prior Acts or parts of Acts relating to such institutions. We should therefore look for the repeal of 13 & 14 Vic., ch. 15, in so far as Upper Canada is concerned. We accordingly find that it is expressly repealed by the 403rd section, and as the Act by its 410th section applies only to Upper Canada, the repeal is confined to Upper Canada. This is the view

which we find taken subsequently by the consolidators of the Statutes, for in Schedule B to the Consolidated Statutes of Canada, although 13 & 14 Vic., ch. 15, is mentioned as consolidated in the Consolidated Statutes of Canada, ch. 85, it is so for the reason that, as to Lower Canada, it was still in force when the Statutes were consolidated; but there is inserted in the margin the entry, "Repealed as to Upper Canada by 22 Vic., ch. 99." Now, although true it is that no legislative authority is given to Schedule B, so as to make the matters therein contained part of the Acts of the Legislature, yet that schedule is entitled to consideration as shewing the view entertained by the Commission for the Consolidation of the Statutes, which was presided over by the late Chief Justice Sir James Macaulay; and the schedule is entitled to the more weight when we find that in Schedule A of the Consolidated Statutes of Upper Canada, which is recognized by the Legislature, the Act 13 & 14 Vic., ch. 15, is not mentioned as being in existence to be consolidated, while 22 Vic., ch. 99, which itself was a consolidation, in so far as Upper Canada was concerned, of 13 & 14 Vic., ch. 15, is, and is consolidated in ch. 54 of the Consolidated Statutes of Upper Canada.

Now, 13 & 14 Vic., ch. 15, having been repealed by 22 Vic., ch. 99, for the purpose of consolidation, we should look to the clauses of the consolidating Act to see whether it throws any light upon the view in which the Legislature then regarded the repealed Act.

Referring then to 22 Vic., ch. 99, we find it, in the interpretation clause, sec. 402, declaring that the words "highway," "road," and "bridge," mean, respectively, a public highway, road, or bridge; and in sec. 300, under the title, "What constitute Highways," we find it declared that all allowances for roads made by the Crown Surveyors in any *town*, township, or place already laid out, or hereafter laid out, and also all roads laid out by virtue of any Act of Parliament of Upper Canada, or any roads whereon any public money has been expended for opening the same,

or whereon the statute labour hath been usually performed, or any roads passing through the Indian lands, shall be deemed common or public highways, *unless where such roads* have been already altered, or may hereafter be altered, according to law. By sec. 302, under the title "Jurisdiction of Municipalities," we find it enacted that, subject to the exceptions and provisions hereinafter contained, *every* municipal council shall have jurisdiction over the original allowances for roads, highways, and bridges within the municipality, but by sec. 303 *no* council shall interfere with any public road or bridge vested as a public work in Her Majesty, or in any public department or board, and the Governor shall, by order in Council, have the same powers as to such road as are by this Act conferred on municipal councils with respect to other roads and bridges; but the Governor *may*, by proclamation, declare any public road or bridge under the control of the Commissioners of Public Works to be no longer under their control, and in that case, after a day named in the proclamation, the road or bridge shall cease to be under the control of the Commissioners, and no tolls shall *thereafter* be levied thereon, and the road and bridge shall *thenceforth* be controlled and kept in repair by the council of the municipality.

Herein we find re-enacted the provision contained in the 2nd section of 13 & 14 Vic., ch. 15, and some of the provisions of ch. 14.

By sec. 317 it was enacted that the council of every township, county, city, town, and incorporated village, may pass by-laws, among other things, for making roads; for raising money by toll on any bridge, road, or other work, to defray the expense of repairing or making the same; for regulating the manner of granting to road or bridge companies permission to commence or proceed with roads or bridges within its jurisdiction; and for regulating the manner of ascertaining and declaring the completion of the work so as to entitle the companies to levy tolls thereon; for taking stock in, or lending money to, any

such incorporated road company ; and for granting to any person, in consideration of his planking, gravelling, or macadamizing a road, power to levy tolls thereon for twenty-one years, and that the grantee of such road shall keep such road in repair.

Here we have the plainest indication that the Legislature had no contemplation of prohibiting, as contended for by the appellant, the levying of tolls on roads in cities and towns. Townships, cities, towns, and incorporated villages, are all placed in the same position in that respect.

In section 322 the 1st section of 13 & 14 Vic., ch. 15, is consolidated as follows : "Every public road, street, bridge, or other highway, in a city, township, town, or incorporated village, shall be vested in the municipality, subject to any rights in the soil which the individuals, who laid out such road, street, bridge, or highway, reserved, and except any concession or other road within the city, township, town, or incorporated village, taken and held possession of by an individual in lieu of a street, road, or highway laid out by him, without compensation therefor ;" and by sec. 323, "Every *such* road, street, bridge, and highway shall be kept in repair by the corporation," &c., &c. ; "but this section shall not apply to any road, street, or highway laid out without the consent of the corporation by by-law until established and assumed by by-law.

The object, then, which the Legislature had in view in repealing 13 & 14 Vic., ch. 15, was, not to remove from the Statute Book clauses which were deemed to have an injurious effect, but, in so far as Upper Canada was concerned, in one consolidated Act relating to municipalities, to re-enact its provisions *with this addition*, that, inasmuch as the Legislature conceived its provisions were as reasonably applicable to townships and incorporated villages as to cities and towns, they were extended to townships and villages. Now, herein we see the plainest proof that the Legislature did not conceive that the provisions of 13 & 14 Vic., ch. 15, related to toll roads at all, or they would not have extended those provisions to townships ;

and so, after making provision for *all* municipalities encouraging the construction of and taking stock in toll roads, and for their acquiring them by purchase from the companies constructing them, in the same Act, by implication, divest every company in the province that had embarked their capital in the construction of those roads, of all the rights and powers which they had acquired under, and in accordance with, the provisions of their Acts of incorporation.

But it is contended that 13 & 14 Vic., ch. 15, being consolidated in ch. 85 of the Consolidated Statutes of Canada, is in as full force in Upper Canada, notwithstanding 22 Vic., ch. 99, as it had been before. It certainly seems that it would have been more accurate to have compiled the Statute in the Consolidated Statutes applicable to Lower Canada only, but the point does not seem to be of much moment, for, granting that its provisions are in force in Upper Canada, they are so certainly as much in virtue of 22 Vic., ch. 99, consolidated in ch. 54 of the Consolidated Statutes of Canada, as in virtue of ch. 85 of the Consolidated Statutes of Canada, and there we find it in effect declared that whatever operation the provisions of 13 & 14 Vic., ch. 15, had in cities and towns, the same precisely prevails in townships, and, as in the latter case it cannot be held, consistently with the precise enactments as to toll roads, that these provisions affect toll roads at all, so neither can they in cities and towns; so that the question is not whether or not 13 & 14 Vic., ch. 15, is repealed as affects Upper Canada, but, granting it to have effect therein, does or not the context, with which its enactments are inseparably conjoined, express the plain declaration of the Legislature that it in fact does not, and that it never did, and that it was never intended that it should, affect toll roads. The only conclusion at which we can arrive, consistently with the clauses which we have extracted from the several Acts cited, is, that toll roads, whether constructed under special private Acts or under 12 Vic., ch. 84, and the Acts passed in amendment thereof, *or* purchased under the

authority of 12 Vic., ch. 5, and 13 & 14 Vic., ch. 14, are *private property*, and are not "roads, streets, or *public highways*" within the meaning of 13 & 14 Vic., ch. 15, either as consolidated in the Consolidated Statutes of Upper Canada, ch. 54, and the Statutes passed in amendment thereof, or in ch. 85 of the Consolidated Statutes of Canada.

The case submitted to us states that in the month of March, 1851, the plaintiffs became incorporated under 12 Vic., ch. 84, and that they constructed their road, being the road in question, along the bank of the Niagara River, from the Suspension Bridge to Table Rock, Niagara Falls, *on lands of Her Majesty*, commonly called Ordnance Lands, under permission and authority of the proper authorities in that behalf: it further states that they had their gate, which is complained of, before ever the town of Clifton had any existence. We are then to take it as admitted in the case, that either by gift from Her Majesty, or grant for valuable consideration, the company had legally acquired the right to construct the road in question and to maintain it, and to levy tolls thereon, while the tract of country which now constitutes the town of Clifton, was part of the township of Stamford. Under these circumstances we cannot hold that the municipality of the town of Clifton can, any more than the township of Stamford could, if Clifton had never been incorporated as a town, deprive the company of their lawfully acquired property without purchasing it from them. The appeal therefore must be dismissed, but without costs, in consequence of the conflicting decisions in the two Courts.

Appeal dismissed, without costs.

THE CORPORATION OF THE TOWNSHIP OF BARRIE (RESPONDENTS) V. GILLIES ET AL. (APPELLANTS). (a)

Road allowances—Passage of by-law by municipality—Liability of timber licensees for trespassing on.

Held, affirming the judgment of the Court of Common Pleas, 20 C. P. 369, that municipal corporations are entitled to the timber and trees growing upon the original road allowances, though, in order to dispose thereof by sale, or to prevent or punish trespassers, a by-law or by-laws must necessarily be passed; and that therefore an action will lie at their suit under the circumstances set forth in the *head-note* to the case in the Court below.

Held, also, that the licenses granted to the defendants in this case did not authorize them to cut and carry away the timber and trees from the road allowances in question.

APPEAL from a judgment of the Court of Common Pleas, reported in 20 C. P. 369, where the pleadings and facts appear.

The following were the grounds of appeal: 1. That plaintiffs did not shew such a title in the property claimed, or any of it, as enabled them to maintain this action: 2. That the right, if any, of plaintiffs, to maintain the action was only in respect to timber cut since the passing of the by-law: 3. There was no sufficient evidence of an original survey laying out the alleged road allowances; and there was no evidence that the alleged road allowances, or any of them, were ever defined or laid out on the ground, or ever opened or used as public roads: 4. That the alleged reservations along and around the lake shores were not road allowances or highways within the meaning of the Municipal Act, and were never defined or laid out on the ground: 5. That defendants had, as against plaintiffs, a right to cut the whole of the timber in question: 6. That defendants had, as against plaintiffs, a right to cut such portion of such timber as was cut before the passing of the by-law, or cut on the alleged reservations along and around the lake shores: 7. That the municipal by-law did not abridge

(a) Argued, 14th January, 1871, before Draper, C. J. of Appeal, Richards, C. J., Hagarty, C. J., Mowat, V. C., Gwynne, J., Strong, V. C.

the right of the Crown to dispose of the timber on the road allowances, nor did the Municipal Institutions Act in any way do so.

Harrison, Q.C., for the appeal. There are two counts in the declaration; not guilty, and denial of plaintiffs' property. Have plaintiffs the property of the trees as against defendants? Take the count in trover. The right of property may be inferred from the possession: here there is no possession. He referred to *Corporation of Sarnia v. Town of Sarnia*, 21 U. C. R. 59; *Elliot v. Kemp*, 7 M. & W. 306; *Northam v. Bowden*, 11 Exch. 70. If so, plaintiffs must prove title, there being no actual possession: *Hunter v. Farr*, 23 U. C. R. 324; *Davis v. Danks*, 3 Ex. 435. Sec. 316 of the Municipal Act vests roads in the Crown. He cited *Mytton v. Duck*, 26 U. C. R. 61; *Berry v. Heard*, Cro. Car. 242; *Cochran v. Heslop*, 3 C. P. 440. The Crown have not adopted the survey. In 1867 and 1868 defendants cut 191 trees, worth \$191.91, on the road allowance proper, and on the road allowances round the lakes 732, worth \$622.45. In the winter of 1868-9, they cut 382 trees on the proper road allowances. Sec. 333 does not apply; but if it does, the by-law is invalid, and for no purpose authorized; but, till by-law passed, and sale under it, the municipality has no interest, or property, or right. Do the licenses give power to cut timber on road allowances? Ch. 23, Consol. Stat. C., sec. 1. *Ungranted* land includes roads. See *McMullen v. McDonell*, 27 U. C. R. 36. All defendants need do is to shew plaintiffs have no title; *ergo*, they may shew title in another party. [DRAPER, C. J. OF APPEAL.—By the Municipal Act, the possession of road allowances is in the municipality; *ergo*, if the Crown have the right, defendants must deduce the right from the Crown.] He further referred to *Owen v. Knight*, 4 Bing. N. C. 54; *Leake v. Loveday*, 4 M. & Gr. 972, explained in *Newnham v. Stevenson*, 10 C. B. 713, 13 C. B. 285; *Gadsden v. Barrow*, 9 Ex. 514; *Buckley v. Gross*,

3 B. & S. 566; *Fitzpatrick v. Dumphy*, 1 Ir. C. L. 366; *Biddle v. Bond*, 6 B. & S. 225.

S. Richards, Q.C., on same side. How is the Crown divested of its rights? In England the laying out a highway merely confers an easement on the public. Our Statute, sec. 314, ch. 54, recognizes the right of the Crown; sec. 336 preserves rights of parties. *The Corporation of Burleigh v. Hales*, 27 U. C. R. 72, shews the soil and freehold remain in the Crown, with all its incidents, unless the Statute alters it. It is said that it is sec. 331, ch. 54, alone, which confers any right on the municipality. This power should be exercised in aid of the object of the dedication: *Badger v. South Y. R. &c., Roads Co.*, 1 E. & E. 347.

Anderson, contra. What is the construction and effect of this Statute? Some licenses were granted before the by-law was passed, others after. Are plaintiffs entitled to recover at all, and if so, the whole timber cut, or only that cut after the by-law was passed? There is nothing in the license referring to highways, which is according to the Statute of Canada, ch. 23. *Ungranted* means *unappropriated* for any other purpose. [DRAPER, C. J. OF APPEAL.—The corporation may cut down and sell timber: the licensees have a right to take it. This is really the argument of Mr. Richards.] Licenses do not extend to road allowances. It is said the clearing up the roads is the main object of the section of the Municipal Act.

Draper, on same side. The licenses do not extend to road allowances, which are not *ungranted*: they have a specific appropriation.

Harrison, in reply, referred to secs. 7 and 8 of ch. 23, Consol. Stat. C. The declaration is sufficient. The Legislative power has not been properly exercised: it is void on the face of it.

DRAPER, C. J. OF APPEAL (4th February, 1871).—The facts important to a correct decision appear to be:—

1. That the township of Barrie was surveyed under the authority of the Crown in 1856; that allowances for roads

between every other concession, and at every fifth lot, were made, with similar allowances around some lakes within the limits of the township : all this being done in obedience to instructions from the Commissioner of Crown Lands.

2. That in 1864 the township of Barrie became a separate municipal corporation, according to the Statute in that behalf.

3. That on 6th July, 1867, that corporation passed a by-law reciting the expediency of preserving the timber and trees on the road allowances and on the appropriations for all public roads in the township, and to provide for the sale of the timber and trees by the corporation ; and they provided for the first by imposing a penalty upon any person who should cut or take such timber and trees without authority from the corporation, and for the second by regulating the mode of such sales.

4. In May, 1867, the Commissioner of Crown Lands issued licenses, to be in force until 30th April next following, to defendants, to cut timber and saw-logs within certain defined limits, which included the township of Barrie. In the body of this license it is provided, among other conditions, that persons settling under lawful authority or title within the limits, shall not in any way be interrupted in clearing and cultivation by the "*licentiate*," meaning, I presume, *licensee*. The description of the limits is indorsed on the license, and contains an exception of "all lots sold or located by the authority of the Commissioner of Crown Lands prior to this date ; provided the conditions of actual settlement, where required, have been duly complied with."

5. Similar licenses were issued on 17th August, 1868, to be in force until 30th April, 1869, including the township of Barrie in the limits.

6. All the timber, the value of which is claimed in this action, was cut and taken away after the passing of the by-law by the corporation of Barrie, and after the defendants had notice of the by-law. The jury have, however, distinguished between the quantity and value of trees cut by defendants during the two seasons.

The questions arising on these facts appear to me to be :—

1. Whether a township duly surveyed, and having become a municipal corporation under the Statute “respecting the Municipal Institutions of Upper Canada,” acquires, by force of that Act, any right, interest, or property in timber and trees growing on allowances for roads made in the original survey; and, if not, whether by a by-law of the corporation, made substantially in accordance with that Statute, the corporation acquires such rights, &c.

2. Whether, after a township has become a municipal corporation, and has passed a by-law assuming rights over such timber on road allowances, Crown timber licenses, to cut timber generally within its boundaries (with the exceptions above mentioned), or on the allowances for roads thereon, will authorize the licensees to cut and carry away such timber.

The present rights and authority of the municipal corporation are created under the Statute of the late Province of Canada, 29 & 30 Vic., ch. 51, as altered and amended by the Acts of Ontario, 31 Vic., ch. 30, 35 Vic., ch. 43, and 33 Vic., ch. 26. As regards the present questions, the existing law is a re-enactment of former Statutes; and the following sections are all which I think it material to notice :—

Sec. 315: All allowances for roads made by the Crown surveyors in any town, township, or place already laid out or hereafter laid out, and also, &c., &c., shall be deemed common and public highways.

The 315th and 316th sections of 29 & 30 Vic. are mere repetitions of secs. 313 and 314 of the Consolidated Statute of Upper Canada, ch. 54.

The 316th section of the present law would appear to be declaratory as to allowances for roads made by the Crown surveyor on the original survey, for his act, and the adoption by the Government of his survey, would no more divest the Crown of title to the soil of such allowances than of title to the lots laid out. The latter remain the property of the Crown until granted, and I apprehend the Crown holds both by virtue of the prerogative, and not by force of the Statute.

But the Legislature have made a different provision in some respects as to public highways. The 317th section gives every municipality jurisdiction over the original allowances. Sec. 338, in general terms, vests every "public road," or other highway, in the municipality, subject to certain rights and exceptions which are entirely foreign to this case. The next section makes it the duty of each municipality to keep "*every such road and highway*" in repair, and this may possibly limit the construction of the preceding section, and exclude from its meaning allowances for roads which have not been opened and used as highways. It is not, however, necessary to determine this point. Sec. 345 authorizes the passing of by-laws for the stopping up and sale of any original allowance for road in the township.

There is another provision in 31 Vic., ch. 30, sec. 37, which indicates the intention of the Legislature to give very extended powers over allowances for roads, a power to every township or county corporation, wherever minerals are found, to pass a by-law to sell the "mineral rights to the roads over which the township or county have jurisdiction." This new sub-section to section 345, above referred to, though rather loosely worded and open to difficulties of interpretation, is a very direct interference with the soil and freehold vested in the Crown.

The rights given to township municipalities, as to timber and trees on road allowances, are only to be exercised by by-laws; but the by-laws may, in my opinion, authorize the sale and the appropriation of the proceeds to municipal purposes: it may be confined to the preservation of the trees. The right to the proceeds of sale is involved in the power to sell, and is consistent with the general object of benefiting the township for whose use, primarily, the allowances for roads were made. I continue to entertain the opinion expressed to that effect in *The Corporation of Burleigh v. Hales*. In the present case, however, we are not dealing with a mere wrong-doer, for the defendants set up a right to the timber under licenses to cut it. The effect of these must next be considered.

It was apparently meant to be argued for the defendants, that the Crown, having the title to all waste and ungranted lands in the province, the whole tract included in the township of Barrie was, at the date of the survey, Crown land, and that nothing has been shewn sufficient in law to divest the Crown of its rights of property in any portion thereof, and that the ownership of the land involved the ownership of the timber and trees, and that the Crown was no more divested of the ownership of the latter than of the former.

To this assertion the Statute respecting municipal institutions appears to me to afford an answer as far as it goes, unless it can be successfully contended that a Statute, which in express terms disposes of lands, the legal title to which is in the Crown, is inoperative. From this proposition I entirely dissent, and no authority has been advanced to support it. The Act for vesting in the principal officers of Her Majesty's Ordnance (among other things) lands which were then vested in the Crown, has no doubt passed the legal estate, though the only act of the Crown was (as in the present case) the assent to the passing of the Act; and the subsequent Act, 19 Vic., ch. 45, transferred the same lands, and vested them in the principal Secretary of State, for the time being, for the War Department.

In my opinion, the municipal council of Barrie, by the express language of the Consolidated Statute of Canada, ch. 54, became entitled to the timber and trees growing upon the allowances for roads made at the original survey, though in order to dispose thereof by sale, or to prevent or punish trespassers, a by-law or by-laws must necessarily be passed.

Then, as to the licenses put in for the defendants. If the conclusion just stated be correct, it is unnecessary to dispose of the second question; but having considered it, I am of opinion that the licenses in question do not authorize the cutting and carrying away timber and trees from the original allowances for roads in a township which, as was admitted at the trial of this case, has acquired a

corporate character under the Act respecting municipal institutions.

The Consolidated Statute of Canada. ch. 23, sec. 1, empowers the Commissioner of Crown Lands, or any officer or agent by him authorized, to grant licenses to cut timber "*on the ungranted lands*" of the Crown, "which shall confer, for the time being, on the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations as may be established." Such licenses shall vest in the holders all rights of property in all trees, timber, and lumber cut during the term, whether cut by authority of the holder or by any other person.

The words "ungranted lands" may signify all lands for which no instrument under the Great Seal, making a disposition of them, has issued. If this large interpretation be adopted, the Statute will extend to all located lands—all lands sold upon credit, all lands occupied by settlers who are in the course of fulfilling those conditions, the fulfilment whereof will entitle them to a free grant. It is no answer, to say that the licenses produced protect persons settling under lawful authority within the limits of the license from interruption in clearing or cultivation, or that lots sold or located by authority of the Commissioner of Crown Lands are excepted by the indorsement on the license. The most valuable timber on a lot may be carried off without interrupting clearing or cultivation, and the power to make an exception involves the power to abstain from making it, and I do not think the Legislature meant to expose settlers or purchasers to have their lots placed at the mercy of lumberers through any oversight or inadvertence in the Crown timber office. I would rather hold the contract, whether express or implied, with a purchaser or settler, to have such effect as to exclude the lands bargained for from the term "ungranted lands." The fact that these exceptions are made shew that, in the opinion of the authorities, the words of the Act would extend to the lands to which the exceptions are necessary to avoid consequences alike impolitic and unjust. These consid-

rations have, I confess, great weight with me in construing the words "ungranted lands."

The licenses, however, do not except allowances for roads, and we are asked to decide whether, as regards licenses to cut timber, they fall within this category.

Something was said on the part of the appellants, objecting to the want of evidence of any adoption by the Government of the survey of this township, which adoption was necessary to establish the reservations made by the surveyor as allowances for roads. It was not pressed; and it appeared to me then, as it does now, too late to raise that objection, after the evidence we have of the existence of Barrie as a township, and of the acts of its municipal corporation, and after its being included in the county of Addington in the first schedule to the British North American Act of 1867. The survey of this township in 1856, according to official instructions, and the reservations for allowances for roads therein, and the work on the ground, still plainly traceable, were all proved, and afford ample ground, in the absence of anything to the contrary, to infer the adoption thereof by the Government; and I come to this conclusion though there was no evidence that any more formal step to erect this township was taken.

Under the 58th section of the Imperial Act, re-uniting the Provinces of Upper and Lower Canada, the Governor is empowered, by an instrument to be issued under the Great Seal of Canada, to constitute townships in those parts of the Province of Canada in which townships were not then constituted * * * and every such instrument was to be published by proclamation, and had the force of law from a day to be named in each case in such proclamation. I understand that, in the adjoining Province, it has been the practice to issue a proclamation giving a name to the new township, and designating its boundaries. But such has not, within my experience, been the practice in this Province. There was, in the Act of 31 Geo. III., a provision for declaring townships among other divisions,

and requiring it to be done by proclamation, but it was intended only to create electoral divisions.

Assuming, then, that Barrie is a lawfully constituted township, as I have endeavoured to prove, I think there is great force in the argument used in giving judgment in the Court below, that the allowances for roads therein are not, and never were intended to be, *granted* in the technical sense of the term. Power is given to the municipalities, under certain circumstances, to close them up or to sell and dispose of and convey them, though not otherwise granted by the Crown than by reserving them as such road allowances, and by the statutory appropriation of them as common and public highways. Thus they were as much placed beyond the power and control of the Crown as are lands actually granted under the Great Seal. It certainly is entirely repugnant to the character of common and public highways, that any individual should have the right to take and keep exclusive possession thereof even for a few weeks or months, and this is among the rights which, under the Statute, the licensee obtains.

It may be said that, until the timber is removed, the public can have no practical use of such highways for ordinary travelling. Granting this, the Legislature have seen fit to confer upon the municipalities, and to them only, powers to do what, according to their discretion, is for the public interest: the rights claimed under the licenses are in derogation of the full and free exercise of these powers in respect to highways, and therefore, in my humble judgment, ought not to prevail.

On the whole, I am of opinion the appeal should be dismissed with costs.

RICHARDS, C. J.—I have had an opportunity of seeing the able and elaborate judgment of the Chief Justice of this Court, and regret that I am not able to concur therein, nor is sufficient time afforded me to give that consideration to the subject which would enable me to express all my views.

Much stress is laid in the judgment of the Court below on the words of the first section of Consol. Stat. C., ch. 23, as to the licenses to cut timber on the *ungranted lands* of the Crown, and that if these words were construed literally timber might be cut by the holder of licenses on lands which are located to settlers or which have been sold by the Crown, but not granted. I have a strong impression that at the time the Statute referred to was originally passed, it was really intended to do just what the Statute says may be done, namely, to authorize the holders of licenses to cut timber on the ungranted land. It was not intended that the purchaser of the land should go on to the land, pay a trifling sum, strip it of its valuable timber, and then abandon it; but rather that, if the timber was cut, the Crown dues should be collected on it, and the value of the portion that was cut on the settler's land should be allowed him towards the payment of the purchase money. It must be recollected that the municipality claims to deprive the Crown of what would otherwise be its absolute property, from which a large revenue is annually derived in this province, not by force of any legislation intended to affect the property or revenue of the Crown, but of an Act for regulating municipal affairs. The right of property in the soil of these allowances for road is undoubtedly in the Crown, and, unless from the peculiar wording of the sections of the Municipal Act, the Crown could authorize the timber to be cut by any one, and receive pay for the timber so cut.

By sec. 317 of the Municipal Act, the municipal council has jurisdiction over the original allowances for road within the municipality.

Sec. 333, sub-sec. 5, gives power to the township council to make by-laws for preserving or selling timber, trees, stone, sand, or gravel, on any allowance or appropriations for a public road.

Keeping steadily in view the fact that the soil and freehold of these road allowances are in the Crown, who could maintain an action against the officers of the Crown for

cutting this timber for public purposes before the municipality had made any by-law on the subject? I do not think the municipality could, and that, I understand, is the effect of the judgment in 18 C. P.

We are asked to put what I consider a strained and doubtful construction upon a section in an Act of Parliament which will have the effect of taking a very considerable sum from the general revenue of the province, to go into the funds of a municipality which may expend it, not for the benefit of those parts of the township where the ungranted and unsettled lands are, and on which the timber was cut by the licensees of the Crown, but which may be expended for the benefit of other parts of the municipality, which may be many miles distant therefrom.

Most people, on reading the sub-sec. 5 of sec. 333 of the Municipal Act, would be surprised to know that in many townships the corporations were raising a revenue from the sale of the standing timber on the allowances for roads in the ungranted portions of the townships. In the early history of the lumber trade in this country it used to be said if a man engaged in the business could only buy one lot in a township, on the strength of that he would cut off all the trees fit for making square timber in the whole township. Here, if the same rule prevails, he would only be obliged to buy the timber on one concession line from the township municipality, and he could then cut as he pleased, or at all events he could so interfere with those who held licenses from the Crown that they would have great difficulty in carrying on their work in a satisfactory manner.

The reasonable construction to put on the section referred to, in my opinion, is, that the municipality may use the powers referred to, subject at all times to the rights of the Crown and their grantees in the timber growing on the highways.

The 37th section of 31 Vic., ch. 30, authorizing the municipality to sell minerals goes much further than any of the preceding enactments, but the language is so clear and explicit that there can be no doubt of the intention

of the Legislature. Then there are precautions taken to protect the general interests of the public, shewing that the Legislature considered they were giving extraordinary powers, far beyond what had been vested in the municipalities by any previous legislation.

Finally, I am of opinion the real object of sub-sec. 5 of sec. 333 was to enable the municipalities to preserve the timber in the settled parts of the county for the purposes of ornament or for the use of the township; and if there was more than was required, then to sell it rather than permit every occupier of land adjoining the allowances (not cut out or used) to cut timber, which, at times, might create quarrels and contentions between neighbours. I do not think it was intended to make them the proprietors of timber plantations on which they might preserve the timber to the prejudice of the settlement of the country, to make merchandise of it at increased value when it might suit them to order it to be sold.

Under the circumstances, I think it better judgment should be given at once in this case, that the Legislature may, during the present sitting, make the matter clear by passing some Act on the subject.

HAGARTY, C. J., concurred with Draper, C. J. of Appeal.

MOWAT, V. C., agreed with Richards, C. J.

GWYNNE, J., and STRONG, V. C., concurred with Draper, C. J. of Appeal.

Per Curiam—Appeal dismissed, with costs.

MCKINDSEY (RESPONDENT) v. STEWART (APPELLANT) (a).

Promissory note—Indorsement after payment by maker—Payment to indorsee under compulsion of law—Right to recover from indorser as money paid to his use.

Held, affirming the judgment of the Court of Common Pleas, 20 C. P. 295, that where defendant held a note made by plaintiff and one B., as security for B.'s debt, and after payment by B., without plaintiff's knowledge at the time, indorsed it to W., whom plaintiff was obliged to pay under compulsion of law, the payment to W. was made for the use of defendant, and that plaintiff could recover the amount from him as money paid to his use.

APPEAL from a judgment of the Court of Common Pleas, 20 C. P. 295.

The following were the grounds of appeal: 1. That the rule for a nonsuit should have been made absolute, as there was no evidence at the trial which justified a verdict for the respondent under any of the counts of the declaration: 2. That the money paid to the plaintiff White, in the suit *White v. McKindsey*, was not in law a payment by the respondent to the appellant at his request or for his use, nor was it money lent by respondent to appellant, nor money received by the respondent for the appellant: 3. That the defence of payment to the appellant by the respondent in the suit of *White v. McKindsey* was therein pleaded, and was, if established, a valid defence, and that plea having been found against the respondent, he could not legally re-open the question in the suit against the appellant, as the matter was then re-adjudicated.

M. C. Cameron, Q. C., and *Ferguson*, for the appeal. Stewart had a right of action on the note when he transferred it. White was in no better position than Stewart, as the note was overdue when indorsed. Money paid under pressure of a suit at law cannot be recovered back. They cited *Marriott v. Hampton*, 7 T. R. 269. Payment was a good defence to White's action against the respondent.

(a) Argued, 14th January, 1871, before Draper, C. J. of Appeal; Richards, C. J., Hagarty, C. J., Mowat, V. C., Galt, J., Strong, V. C.

ent. White had no right but Stewart's, which he derived from the indorsement, and a defence against Stewart was a defence against White. Without fraud no action to recover back the payment can be maintained. They referred to *Bleaden v. Charles*, 7 Bing. 246; *De Medina v. Grove*, 10 Q. B. 152; *Duc de Cadaval v. Collins*, 4 A. & E. 858; *Reid v. Furnival*, 1 Cr. & Mee. 538; *Johnson v. Kenion*, 2 Wils. 263; *Brown v. Daly*, 2 T. R. 80; *Crossley v. Ham*, 13 Ea. 498.

Harrison, contra. Was the money paid under compulsion? See *Bullen and Leake*, p. 40, note a. The payment of \$300 was sufficient to overpay the principal of the note, and part of the interest, and since then the money has been paid by McKindsey under legal compulsion, brought about by Stewart's dishonesty in indorsing to White. Fraudulent conduct implies a request. A plea of estoppel might perhaps have succeeded; not having pleaded it, they have waived it. But there is no estoppel: *Hamlet v. Richardson*, 9 Bing. 647; *Follett v. Hoppe*, 5 C. B. 242; *Howlett v. Tarte*, 10 C. B. N. S. 813.

Cameron, in reply. In *Bleaden v. Charles* the note was indorsed before it was due: it is here indorsed after it was due.

DRAPER, C. J. OF APPEAL (4th February, 1871), delivered the judgment of the Court.

On the 12th November, 1861, one Bastedo and the respondent, as surety for him, made a joint and several note for \$280, payable to the appellant one year after date.

Bastedo died on 3rd of August, 1868, and, according to the statement of the case, as reported in the Court below, the appellant indorsed the note in blank, and delivered it to one White after Bastedo's death. It does not appear what consideration White paid, but he brought an action on the note against the respondent, and obtained a verdict. On that trial, in December, 1868, the appellant swore that he had received nothing in payment of principal or inter-

est. Thereupon the respondent paid to White's attorney \$280, with \$1.50 for interest, and \$82.63 for costs of that suit.

Soon after this a receipt was found among Bastedo's papers, in the following terms : "Milton, April 14, 1867.—Received from G. T. Bastedo the sum of three hundred dollars on a note I hold against him and G. C. McKindsey," signed by appellant. At the trial of this cause, the genuineness of this receipt was disputed, and the jury found for the plaintiff, the now respondent.

The appellant obtained a rule *nisi* in the Court below, upon leave reserved, to enter a nonsuit, or for a new trial on the law and evidence, and on the ground of misdirection in not charging the jury that the action would not lie. The rule, after argument, was discharged, and this appeal was thereupon brought.

The main question is, whether the money paid by the respondent to White was money paid to the use of the appellant.

It must, we think, in the absence of any evidence to the contrary, be assumed that the appellant received full value from White for the transfer of the note. Hence, if White (without fault on his part) could not have obtained payment from the respondent, the appellant would have been liable to him.

It is clearly established that respondent paid White under compulsion of law, and the verdict of the jury establishes that, before the transfer to White, the appellant had received \$300 as a payment upon this note.

There is nothing to impeach White's title to recover upon the facts appearing when the verdict was rendered in his favour. The payment to him was, as already stated, under compulsion of law.

Then the case stands thus : The appellant, for full value, transferred the note when he had no claim to \$300 of the principal and interest due upon it, on the 14th April, 1867, and by thus enabling White to recover the full amount, he did a wrong to the respondent. If even the note had,

under the actual circumstances, been transferred to White with the respondent's assent, it would, as between the appellant and respondent, have been a note made by respondent for appellant's accommodation, or as his surety, and therefore, when the respondent was compelled to pay it, he relieved the appellant from his liability to pay White, and consequently paid it to his use. The case comes clearly within the principle of *Bleaden v. Charles*.

We think, therefore, the appeal should be dismissed with costs.

Appeal dismissed, with costs.

REGINA (RESPONDENT) V. THE LAW SOCIETY
(APPELLANTS) (a).

Repairs to Osgoode Hall—Liability for—Estoppel in pais.

Held, affirming the judgment of the Court of Common Pleas, 20 C. P. 490, Gwynne, J., dissenting, that the Law Society were not released, under the facts and circumstances there set forth, from their covenant to repair and maintain the building known as "Osgoode Hall," for the accommodation of the Superior Courts of Common Law and Equity, and that no estoppel arose, in favor of the Society, against the Crown, in consequence of the several Acts of the Legislature that had been passed in relation thereto.

Appeal from the judgment of the Court of Common Pleas, reported in 20 C. P. 490, where the facts are fully stated, the appellants contending that since the passage of the Acts there referred to, and under the circumstances set out in the special case, they had ceased to be liable under the covenant contained in the deed of 20th June, 1846, in the special case recited.

J. H. Cameron, Q. C., and *Anderson*, appeared for the appellants, and *C. Robinson*, Q. C., for the respondents.

(a) Argued 21st January, 1871, before Draper, C. J. App., Richards, C. J., Hagarty, C. J., Mowat, V.C., Gwynne, J., Strong, V.C.

DRAPER, C. J. OF APPEAL, delivered the judgment of the Court.

The Law Society, by deed dated 20th June, 1846, in consideration of a previous agreement and £6000 paid to them, did covenant with her Majesty, her heirs and successors, "that they do and shall from time to time and *at all times hereafter*, sufficiently find and provide, at their own costs and charges, and without further charge and expense to the Province, fit and proper accommodation for the Superior Courts of Law and Equity of Upper Canada, *as now existing or hereafter to be lawfully constituted, for all time to come*, at the seat of the said Society."

The Consol. Stat. U. C. ch. 33, sec. 6, after reciting this covenant, and that, for the purpose of carrying out that arrangement, four several sums of money, amounting to \$224,000, were by four several Acts granted to her Majesty (which were raised by debentures under the powers in the said Acts), declared and enacted that for the purpose of paying the interest on the debentures, and of liquidating the principal, there had been, and should continue to be, collected on the proceedings in the Superior Courts of Law and Equity in Upper Canada, including the Practice Court and proceedings before the Heir and Devisee Commission, the sums set forth in a certain schedule to the Act subjoined; and the Act further authorized the sale of certain land of the Crown towards satisfaction of the said debentures.

The Court of Common Pleas was not established until 1849, under the Statute 12 Vic. ch. 63.

On the 23rd March, 1865, a further sum of \$2000 was advanced by the Government to the Law Society, to be expended on certain repairs of a permanent character connected with the roof, drainage, &c., such repairs being immediately required to prevent the necessity of increased expenditure.

By an agreement, made 6th November, 1867, between the Government of Ontario and the Law Society, the latter, in consideration of \$3000, to be paid annually to them,

covenanted to light and heat the said building, and pay and bear all expenses connected with the maintenance of the apparatus therefor.

The sole question is whether the Law Society, since the passing of the said several Acts, are still liable under the covenant of 20th June, 1846, or whether, under the facts and circumstances above set forth, the Law Society are not discharged from the performance of the said covenant.

The arguments for the Law Society may be thus briefly stated:—

That the recital to the Acts 18 Vic. ch. 122, 20 Vic. ch. 64, and 22 Vic. ch. 31 (assented to 4th May, 1859,) and the Acts themselves, indicate a clear intention to relieve the Law Society from their covenant, and are inconsistent with its existence.

Now, the first of these Acts recites the existence of the covenant of 1846; that since entering into it the Legislature has increased the number of the Superior Courts in Upper Canada, and has occasioned the necessity for further accommodation and additional expenditure; that it is expedient to assist the Law Society in paying a debt of £4000 incurred by them, in addition to the £6000 previously granted for providing for the accommodation of the Courts; that increased accommodation is necessary; and then an additional sum of £10,000 is granted. The next Act, 20 Vic. ch. 64, only recites the insufficiency of the sum "granted for the erection of buildings," by 18 Vic., and grants an additional sum of £10,000. The third simply recites the insufficiency of the sums already granted, and the necessity of granting more, and authorizes the raising a further sum of £30,000.

All these Acts authorize the issue of debentures, and make provision for the payment of principal and interest, by a tax on law proceedings, as was done by the Act 9 Vic., and as appears in the Consolidated Act, which contains in one schedule the several fees imposed on proceedings in law and equity.

It was also argued that the Government, by these Acts, induced the Law Society to believe that their covenant was no longer binding; that the Government acted as if this was the case, and thus induced and aided the Society to change their position, and so there is an estoppel *in pais* in favour of the Society.

So far as the intentions of the Government are concerned, we have only the different statutes above mentioned to enable us to ascertain them.

It does not seem to be questioned that the covenant was binding when first entered into. The first Act (9 Vic.) recited the necessity of making provision for the accommodation of the Superior Courts, and granted to her Majesty £4000 be paid to the Law Society, as soon as they entered into the covenant already set forth; and they entered into that covenant in consideration of that advance. The last statute recites that all the moneys raised, under that and the intermediate Acts, were granted *for the purpose of carrying out the arrangement*; and it is not denied that the Law Society received them all. Now the only place where the arrangement is to be found is in the Act 9 Vic., and it is clear that the covenant was given in execution of the Society's part of it.

Then, the subsequent statutes, which authorize the raising of additional sums, refer to the insufficiency of the sum previously granted, and shew that the additional grant is to complete the purpose for which the 9 Vic. was passed. I gather from the recital to 18 Vic. that the Law Society controlled the expenditure upon the alterations and additions made; and this last mentioned Act was passed in pursuance of representations contained in their petition. This Act contains in its recital these further words in regard to the necessity of increased expenditure, "It is necessary to extend and continue the provisions of the said recited Act until the debt of the said Law Society and all costs of the said alterations and further accommodation shall have been discharged and paid." I confess myself unable to extract from this statute the slightest indication

of an intention to relieve the Law Society from their covenant to provide fit and proper accommodation for the Superior Courts of Law and Equity for all time to come. The subsequent statutes appear to me to be the furtherance of the original intent, which, taking the whole together, and construing all these Acts as *in pari materia*, seems to amount to this, that the Law Society, having a convenient site, on which Osgoode Hall (named in 18 Vic.) was in part erected, were willing, and probably desirous, that the Superior Courts should be located there, and were also willing to erect the necessary buildings for a fitting pecuniary consideration; that the Government were willing to avail themselves of this mode of obtaining fitting accommodation for the Superior Courts, and obtained a grant of £6000 from the Legislature to enable them to supply the Law Society with the requisite funds; but the Law Society incurred a debt of £4000 beyond the £6000 granted, and the Legislature made them a further grant, and subsequently granted further sums till the whole amounted to \$224,000; but nothing shews that the Government or the Legislature interfered to direct the expenditure necessary for the magnificent buildings which are occupied, partly and principally by the different Courts and their officers, the remainder by the Law Society: it was altogether the work of the Law Society.

I repeat, I cannot find in these facts or statutes anything to lead me to the conclusion that the release of the Law Society from its covenant of June, 1846, was in the contemplation of either party thereto when the advances were made: as a matter of law, I am compelled to a contrary conclusion.

As to the estoppel *in pais*, I am inclined to think that there is at least as much ground for holding that the Law Society obtained the increased grants, by leading the Legislature, or the Government, to make them, on the assurance of the Society's covenant to maintain the buildings at at their own expense, as for the contrary suggestion; but, as this was not put forward on the part of the Crown in argument, I shall not rest my judgment upon it.

I am of opinion that the Law Society are not discharged from the performance of this covenant, and that judgment should be entered for the Crown, with 1s. damages.

GWYNNE, J., adhered to the opinion expressed by him in the Court below.

Per Curiam.—Appeal dismissed.

HILARY TERM, 34 VICTORIA, 1871.

(February 6th to February 19th.)

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ JOHN WELLINGTON GWYNNE, J.

“ THOMAS GALT, J.

REGINA V. BENNETT.

*Criminal law—Indictment for refusing to swear voter at agent's request—
Omission of name of agent—Recording name of voter refusing to swear—
C. S. C. ch. 6, s. 55, subs. 3.*

In an indictment against a deputy returning officer at an election, for refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters, the omission of the *name* of the agent from the indictment will vitiate it.

In the same indictment another count charged defendant with entering and recording in the poll books the names of several parties as having voted, although they had refused to take the oath prescribed by law: *Held*, not an indictable offence, being a creature of the statute, which also prescribed the penalty and the mode of enforcing it.

Remarks upon the otherwise objectionable character of the indictment, in setting out in the inducement a copy of the poll book containing a number of names, while none were mentioned in the indictment itself, a reference being merely made to the “said list.”

Demurrer to an indictment, found at the Assizes for the County of Renfrew, in May, 1870, against the defendant, as Deputy Returning Officer at an election held on the 9th November, 1869, for the return of a Member of Parliament for the said County of Renfrew.

There were two counts demurred to, namely, the first and third. The first count was as follows, after reciting the writ and preliminary proceedings, “And the jurors aforesaid, upon their oath aforesaid, do further

present that the said Edmund Bennett, to wit, on the said 9th day of November, 1869, so being such Deputy Returning Officer, unlawfully, knowingly, wilfully, and in contempt of the statute in such case made and provided, and in violation of his office and duty, as such Deputy Returning Officer, did refuse and neglect to swear and administer the oath required by law and the statute in such case made and provided, to the person and persons presenting himself and themselves as the electors and voters mentioned and set forth in said list (referring to a list of names given in the inducement) of duly qualified electors and voters for the said townships of North Angola and South Angola, and whose names are recorded and entered in the said poll book for the said last mentioned township as having voted for and at said election in said Townships of North Angola and South Angola, although the said Edmund Bennett was requested and required by the authorized and qualified agent and agents of the said James Findlay, one of such candidates, as aforesaid, at such election, so to do, swear, and administer, as by law he should and ought to have done, as such Deputy Returning Officer, to the wit, &c., &c.”

There was a demurrer to this count on several grounds, and on the argument the further objection was taken that the name or names of the agents were not given in the indictment.

The third count was : “That the defendant, so being such Deputy Returning Officer, unlawfully, knowingly, and wilfully, and in contravention of the Statute in such case made and provided, and in violation of his office and duty as such Deputy Returning Officer, did enter and record in such poll book for said Townships of North Angola and South Angola, the names of the several persons therein mentioned and set forth as having voted at said poll for said townships, at said election, and did enter and record their votes as aforesaid, although the said several persons, representing themselves as the duly qualified voters on said list, had refused to swear and take the oath prescribed by

law, as aforesaid, as by law he should not have done, as such Deputy Returning Officer, to, &c., &c.”

The demurrer to this count was, among others, “That the neglect of duty, if any, subjected the party to a penalty, and was not the subject of an indictment.

Anderson, for the demurrer, cited *Russell on Crimes*, 86, 87.

Harrison, contra, cited *Reg. v. Wyatt*, 1 Salk. 380; *Rex v. Centrolus*, 6 C. & P. 784; *Crouther's Case*, Cro. El. 654; *Rex v. Simsbury*, 4 T. R. 437; *Rex v. Holland*, 5 T. R. 107.

Anderson, in reply, referred to *Couch v. Steel*, 3 E. & B. 402.

GALT, J., delivered the judgment of the Court.

I shall consider the objection to the third count first. This count is framed on the 3rd subsection of 55th sec. of ch. 6, Con. Stat. of Canada, which is, “And when any such voter has been so required, by the Deputy Returning Officer, or by any of the candidates or his agent, to take such oath or make such affirmation, and refuses to take or make the same, his refusal shall be stated by the Deputy Returning Officer in his poll book, by entering after the name of such voter the word ‘refused,’ and in every such case the vote shall not be taken or recorded in the said poll book; and if any vote is in any such case taken and recorded, it shall be, *ipso facto*, null and void; and the Deputy Returning Officer shall, for having taken and recorded the same, or for having caused it to be taken and recorded in his said poll book, incur a penalty of forty dollars.”

In *The Queen v. Robinson*, 2 Bur. p. 799, Lord Mansfield says: “The objection to this indictment is, that the offence is not indictable, because the Act of Parliament has pointed out a particular punishment, and a specific method of recovering the penalty which it inflicts. The rule is certain that when a Statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence

(not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other; and this is the resolution in *Castle's* case, Cro. Jac. 643." See also *Couch v. Steel*, 3 El. & B., cited by Mr. *Anderson*, in which Lord Campbell says: "The penalty being annexed to the offence, in the very clause of the Act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the Act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for the breach of it, except for the particular mode of punishment, by a penalty prescribed by the Act."

The offence charged in this count is created by the Statute and a special penalty affixed, and a specific remedy for enforcing the penalty is pointed out in the 87th section of the same Act. I am, therefore, of opinion, that no indictment will lie in this case.

There were several objections taken to the first count, in addition to the one above mentioned, viz., the omission of the name of the agent or agents; but in the view which I have formed on that point it is unnecessary to consider them. It is very singular that there is no clause in the Statute directly instructing the Deputy Returning Officer to administer the oath set forth in the Statute, at the request of either the candidate or his agent; but it is plainly his duty so to do, from the provisions of the 55th section, and I entertain no doubt that an indictment will lie for neglecting or refusing to do it. The cases cited by Mr. Harrison shew conclusively that where a person filling a public office wilfully neglects or refuses to discharge the duties thereof, and where no special remedy or punishment is pointed out by the Statute, there an indictment will lie, as there would otherwise be no means of punishing the delinquent. From the provisions of the Statute it is evident that the Legislature had in contemplation that a candidate would be represented by an agent at the polls, when he was not present in person; for by the 35th sec-

tion it is enacted, that "At any election, as aforesaid, whether at the hustings on the day of the opening or of the closing of the election, or at the polling places opened and kept for such election, in the absence of any person authorized in writing to act as agent for any absent candidate, any elector, in the interest of such candidate, may at any time during the election, declare himself to be, and may act as the agent of any such candidate, without producing any special authority in writing for that purpose." From the foregoing it appears that the candidate may authorize any person, in writing, to act as his agent, or any elector in the interest of such candidate may declare himself to be such agent. The objection to this count is that the name or names of the persons stated to be the authorized and qualified agent or agents are not given. In my opinion the defendant is entitled to be informed with certainty, by the indictment itself, of the name or names of the persons whose request he has neglected to comply with. It is not every person who is entitled to act as an agent for a candidate; he must either be authorized in writing, or he must be an elector. The allegation in this count is, that the defendant was required "by the authorized agent and agents" of the opposing candidate. I see no authority for the appointment of more than one, and and it is only reasonable that the defendant should be informed of the name of the agent whose demands he has refused to obey, because it may so happen that the defence might turn on the want of authority in the person requiring the administration of the oath. Considering that there are two classes of agents authorized, I think the defendant should be told not only the name of the agent, but whether he claimed to act under a written authority, or as an elector in the interest of the candidate. It is manifest that endless confusion would arise at an election, if any person, without any authority or interest, could intrude himself into the contest. There are no provisions in the Statute sanctioning such a proceeding, and as an authority of some kind or other must be shewn to the

Deputy Returning Officer, before he is even justified in permitting a person to act as agent, he should not, when he is called into question for refusing to accede to the requisition of any agent, be left in doubt as to the name of the agent, or as to the nature of his authority. As to the certainty required in indictments, see *Ch. Cr. Pr.*, title "Indict." P. 46, 16 ed. I am of opinion that the objection should prevail, and that the demurrer must be allowed.

It is also to be observed that, for all that appears in the indictment, no voter may have presented himself to vote, or have actually voted, but defendant may have entered their names falsely, which is a different offence.

There were other objections taken, to which I have not thought it necessary to refer, but I am strongly of opinion that the frame of the indictment is very objectionable. In the inducement a copy of the poll book is set out containing a great many names, and then in the indictment itself no names are mentioned, but a reference is made to the "said list." I think it would have been difficult to sustain such a mode of pleading (even supposing it to be good), if an application had been made to quash the indictment as calculated to embarrass the defendant.

Judgment for defendant.

HOPE V. CALDWELL.

Attorney and client—Security for future services—Foreign law—Pleading.

Held, that a security taken from a client by an attorney or counsel, for costs to accrue in respect of services *to be* rendered to the client, is invalid and cannot be enforced.

Held, also, that to displace the defence to a note, by shewing the *lex loci contractus* as different from the law of our Courts, such foreign law must be replied and set out on the record.

DECLARATION—first count, on a note not objected to; second count, for \$1,000, payable to Carter & Hatton, on a note dated 8th January, 1870, made by defendant to Carter & Hatton, or order, on demand, payable at Molson's Bank, Montreal, endorsed to plaintiff.

Plea, on equitable grounds, to second count, that before making of note defendant was in close custody in gaol at Montreal, Province of Quebec, on a charge preferred by the United States, and his extradition claimed, and while in custody he retained the payees as his attorneys for his defence on said charge, and for their fees as such attorneys in the defence he made and delivered to them, and they received from him, the note mentioned in the first count; and afterwards, while in said close custody, and about to be brought before the Court, that his said attorneys might move for judgment, the said payees, as such attorneys and while so acting for him as such, unlawfully threatened him that they would not move for his discharge, but would abandon further defence and leave defendant in custody unless he would make and deliver to them the note in the second count, and defendant, by reason of such threats, and in order that his discharge might be moved for, made said note to said Carter & Hatton, the payees, for costs to be thereafter incurred, and for no other consideration, and plaintiff held same without consideration, &c.

Issue.

The case was tried at Toronto, before Hagarty, C. J.

It was admitted that the present plaintiff stood in the same position as the payees. The defendant was sworn.

He proved that he was in custody as alleged, and retained Mr. Carter, who, with defendant's assent, retained Mr. Devlin, also a lawyer, and he gave a \$1,000 note to Devlin and another note of like amount to Carter & Hatton (that in the first count). On the first charge against him, on 7th January,* he was discharged by Judge Badgley, but was detained on another charge, and on the evening of that day he saw Devlin, Carter and Hatton, in gaol, and they said they ought to have more pay; that they had extra trouble: another charge was pending. Defendant said he could not pay more, and Devlin said unless he did so he would drop the case. Next morning he was taken to Court; Devlin and Hatton called him into the grand jury room and told him unless he made the additional notes he might defend himself. He then signed two notes, each for \$1,000, one to Devlin, the other to Carter & Hatton, set out in the second count. Then they went before the Court, and he was discharged. Nothing further was done for him. He was served with the papers on the second charge before his discharge on 7th January. He did not agree to give the second notes that evening in gaol; said he would think over it. He had paid \$750 on the first note before the 7th January.

Mr. Carter was sworn for plaintiff, and said he was a Queen's Counsel and member of the bar. He was a partner of Hatton's. Their firm was retained for defendant; that in criminal matters they invariably stipulated for the fee beforehand; contrary to usual course they agreed to take notes: that a round sum was always charged in Lower Canada: that the sum here was not at all large in such a case, and they often received much larger fees; that all these notes were for counsel fees; there were no attorneys' fees in criminal cases; no tariff for attorneys' fees; that they always signed as counsel: that their Courts had held that there was no *quantum meruit*: that lawyers might stipulate for what fee they liked: that their Courts would not allow the consideration of notes given for fees to be impeached: that this was a protracted enquiry: that the

first note was given 8th December; there was then only one charge against defendant: that they never contemplated a second charge being made when the first note was given; the charges were perfectly independent: that their retainer was earned when they got his discharge on first charge, and they then found there was a second lengthy investigation, and they told defendant there must be fresh retainers. They told him if he were unwilling to give the second retainer they would at once hand over his papers to any other counsel, and he agreed that evening in the gaol to give the second retainer, and there was no coercion whatever: the notes were given on the morning of 8th January.

Mr. Hatton, the other partner, swore that there had been some proceedings taken for his defence on the second charge before he gave these notes.

It was objected that the note mentioned in the second count was void, being taken for future costs, and that counsel taking security was in the same position as an attorney.

A verdict was taken for plaintiff, with leave to defendant to move to enter a nonsuit on the second count if the Court should think plaintiff not entitled to recover.

In Easter Term last, *J. H. Cameron*, Q.C., obtained a rule on the leave reserved, to which, in Michaelmas Term last, *C. S. Patterson* shewed cause, citing *Scarth v. Pentland* L. R. 1 C. P. 642; *Philby v. Hazle*, 8 C. B. N. S. 647; *Gallway v. Corporation of London*, L. R. 4 Eq. 90; *Re Simons*, 2 D. & L. 500; *Kennedy v. Broun*, 13 C. B. N. S. 677.

Cameron, Q.C., contra, cited *Grell v. Levy*, 16 C. B. N. S. 73; *Appington v. Bullen*, 2 D. & W. 184; *Sanderson v. Glass*, 2 Atk. 296; *Nokes v. Warton*, 5 Beav. 448; *Carter v. Palmer*, 1 Ir. Eq. R. 289; *Brown v. Kennedy*, 33 Beav. 133, S. C. 33 L. J. Chy. 71, 342, S. C. 10 Jur. N. S. 141, S. C. 13 C. B. N. S. 667; *Earle v. Hopwood*, 9 C. B. N. S. 566; *Savery v. King*, 5 H. L. 627; *Tyrrell v. Bank of London*, 10 H. L. 26.

HAGARTY, C. J.—In *Uppington v. Bullen* (2 Dr. & W. 188) Lord St. Leonards says: “The general proposition, that a solicitor will not be permitted to take a security for costs to be incurred, is established beyond the reach of controversy. * * * Even if this Court should hold that an attorney may take a valid security for cash advances, yet if he takes a security for his prospective costs generally, he cannot ask the Court to distinguish between such cash advances and ordinary costs.”

In *Booth v. Creswick* (13 L. J. N. S. 217) Lord Chancellor Lyndhurst says, “I am of opinion that a security cannot be taken by a solicitor for future costs, and that is the settled rule of this Court.” He cites Lord Eldon’s opinion in *Jones v. Tripp* (Jac. 322), which is very strong to the same effect.

Willens v. Tandy (5 Ir. Eq. R. 4) is to the same effect, resting the rule on public policy.

In *O’Brien v. Lewis* (32 L. J. N. S. Chy. 569), Lord Westbury says: “The law treats the relation between solicitor and client in a peculiar manner. It has laid down certain rules and scales of charges by which the services of a solicitor are to be remunerated, and it imposes upon him an obligation not to bargain with his client, while that relation exists, for any additional benefit beyond that legal remuneration.”

In *Peirce v. Beattie* (32 L. J. N. S. Chy. 734) Kindersley, V. C., held an agreement to allow a solicitor five per cent. on moneys to be recovered could not be supported, even though afterwards made the subject of a settlement of accounts.

In *Sanderson v. Glass* (2 Atk. 298), Lord Hardwicke says, “If an attorney, *pendente lite*, prevails upon a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled.”

In *Welles v. Middleton* (1 Cox, 125) the Chancellor says: ‘In the case of attorneys it is perfectly well known that an attorney cannot take a gift while the client is in his

hands, nor instead of his bill; and there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it was not so; but once extricate him and it may be otherwise.'

Carter v. Palmer (1 Ir. Eq. 289), before Lord Plunket, treats the position of counsel and solicitor in dealing with the client apparently in the same light.

It is to be observed that in the case before us, the real plaintiff, Mr. Carter, in his evidence, states very expressly that the notes sued on here were for counsel fees; that there is no tariff of costs in criminal cases; and he asserts the whole consideration of the impeached note to be a counsel fee.

The law is most elaborately discussed in the case of *Kennedy v. Broun and wife* (13 C. B. N. S. 677), arising out of the famous litigation for the Swinfen estates. The plaintiff, a barrister, sued on accounts stated with the female defendant before marriage. One of the pleas was that the accounts were stated of and concerning moneys claimed by the plaintiff in respect of work, journeys, care, skill, &c., and moneys paid by plaintiff for her in pursuance of divers illegal agreements made between them for the unlawful maintenance by plaintiff of said defendant in divers actions and suits, &c., &c. Evidence was given of promises by defendant to pay £20,000 during the litigation and after the last trial, as compensation for plaintiff's great exertions. At the trial, Cockburn, C. J., said: "Whatever plaintiff did as attorney would fall to the ground. What he did was done as counsel, and it has been laid down by the highest authority that a barrister can maintain no action for his fees." The case was elaborately argued in term, and the judgment of Sir William Erle is most instructive: "We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect, and furthermore that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning

advocacy in litigation. * * * It follows, then, that the requests and promises of defendant, and the services of the plaintiff, create neither an obligation, nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise."

The law therefore seems reasonably clear that, 1st, securities given for costs, to be incurred by an attorney or counsel for his client, cannot be enforced; and 2nd, on the distinct authority of the last case, that the relation of counsel and client creates an incapacity to contract effectually for hiring or advocacy in litigation.

That the note in question was given for future advocacy is certain on the plaintiff's evidence. An express promise to pay this \$1,000 to induce the (real) plaintiff to act as defendant's advocate, could not, I think, on the authorities, be enforced; nor do I see how any defence available in an action on such a promise, must not be equally available in an action by the payee of a note given on the same consideration. It seems merely a substitution of a written for a verbal promise for the same purpose. I think also, that a negotiable note like this would fall under the head of a "security" given for future costs. It is payable on demand, and might have been instantly endorsed to an innocent holder for value.

In *Jeffreys v. Evans* (14 M. & W. 210) it was pleaded to a note that it was given to plaintiff, as an attorney, for costs due and to become due, and that no signed bill was ever delivered. This plea was demurred to as being no answer to a note which was an independent cause of action, and it was held bad. Parke, B., said, "If, instead of giving a promissory note, the defendants had paid the money, could they have recovered it back? If not, the plea is no defence." Pollock, C. B.: "The plaintiff is suing on the security given to him, and which must be considered as having been given in discharge of so much of his bill. * * * The defendant, instead of pleading to the action, should have applied to tax the bill and stay

proceedings on payment of the sum found due on taxation." It was then objected that the note was given for costs incurred *or to be incurred*. Parke, B.: "That is a defence only as to part; it does not vitiate the contract." Alderson, B.: "You may shew that when you come to assess the damages."

I am of opinion that, according to the law of England, by which law we are here governed, there was no legal consideration for this note, and that the defence is proved.

But it is urged that this note was made and is payable in the Province of Quebec and is not governed by our law, and that by the laws of Quebec such a note given for a counsel fee to be earned is valid, and that the *lex loci contractus et solutionis* must govern.

To this defendant answers that, if plaintiff desired to remove his case from the operation of our law, he should have replied that the note was made and was payable in the foreign country, and was governed by the foreign law, setting out such law and proving it like any other matter of fact. Instead of so replying, he has merely taken issue on the plea. It was no necessary part of that plea to prove that the note was made abroad. The plea merely states a defence good in our law. There seems much force in this objection.

I gather from the report of *Benham v. Lord Mornington* (3 C. B. 138) that where foreign law is relied on it must be set out affirmatively, and the case brought clearly within it. Thus, a plea seeking to avoid a bond on the ground that it was executed in France and void by French law, was held bad on demurrer for not directly affirming what the law was. Tindal, C. J.: "I think the plaintiff was entitled to a distinct statement of the law and of the facts, in order that he might take the opinion of the Court as to whether or not they amounted to a legal defence. * * The entire plea consists of negative propositions only." Cresswell, J.: "The French law is only to be taken notice of as any other matter of fact, and must be pleaded."

If to the plea before us the plaintiff had replied that

defendant broke his promise *de injuriâ suâ absque tali causâ*, the defendant would merely have to prove a defence under the only law recognized in this Court. By merely taking issue as he has done here, he certainly opens no wider proof.

This Court knows nothing judicially of the foreign law, and to bring it under our notice the plaintiff must, I think, reply confessing the traversable facts of the plea, and seeking to avoid their legal result by averment and proof of another law governing the contract.

In a late case of *Bradlaugh v. De Rin*, (L. R. 3 C. B. 538), where endorsee sued acceptor of a bill, the pleas traversed the acceptance and endorsement, issue was joined, and at the trial it was proved the bill was drawn in France, where the last endorsement was also made, and that by French law the endorsement was bad and transferred no property in the bill, and that plaintiff would not be the proper person to sue in France. The Court decided in favour of defendant. No question was raised, in any shape, as to the pleadings or right to give this evidence on this issue. It was a direct traverse of a material allegation in the declaration of endorsement and interest thereby passing to plaintiff, and is distinguishable (if necessary) on this ground.

In *Lebel v. Tucker* (L. R. 3 Q. B. 77) endorsee sued acceptor. It was pleaded that endorsement was made in France, under French law, and transferred no right to plaintiff, setting out the French law.

Replication, that bill was drawn and accepted in England, payable in England, and that the endorsement was according to English law.

Substantially the same point, the validity of the endorsement, so as to vest property and right of action in the plaintiff, was in issue in each case. I think that, according to all the principles of pleading, it is not open to plaintiff to displace this defence, based upon our law, by a resort to foreign law, without replying and setting it out on the record.

Mr. Cameron further argued for defendant that even if properly before us on the record, we should not give effect to the foreign law against our own to a suitor who voluntarily seeks a remedy here. He cited *Grell v. Levy* (16 C.B. N. S. 73). An agreement was made in France with an English solicitor to recover debts due in England, on the terms that the solicitor, if successful, should have half the money recovered. He did recover, and retained half, and the French clients sued him for money had and received, to which he pleaded the agreement being made in France, and that it was valid by French law. The Court held that plaintiff must recover. Erle, C. J., says: "The argument that the agreement was valid because made in France, is disposed of by the fact that it was to be performed in England by an officer of an English Court. It was clearly an invalid and illegal contract." Williams, J.: "The question is whether we must not hold it an illegal thing for an officer of this Court to make such a bargain." The case is clearly distinguishable.

I refer to the judgment of Lord Lyndhurst, in *Quarrier v. Colston* (12 L. J. Chy. 57). 'I am not pronouncing any judgment on this latter point, as I think it not properly before us. There was, of course, no legal duress of plaintiff, as stated in the plea. The wisdom and justice of our rule, as to securities for costs to be incurred, seem amply vindicated by the evidence before us in this case, and the words of Lord Thurlow, already cited, as to "the crushing influence of the power of an attorney who has the affairs of a man in his hands," seem not inappropriate.

I think the rule must be absolute to enter nonsuit as to the second count.

GWYNNE, J.—The short substantial point raised by the plea, which is pleaded on equitable grounds to the 2nd count, upon which alone any question arises, is, that the defendant made the note in that count sued upon payable to Messrs. Carter & Hatton, of Montreal, as his attorneys, as a security for certain costs thereafter to accrue in respect

of services *to be* rendered to the defendant in a certain litigation in which he was involved, under the Extradition Treaty, as set out in the plea, and that, save as aforesaid, there was no value or consideration for the making of the note, and that it was endorsed by the payees without value or consideration to the plaintiff, who is now the holder thereof without value. Upon this plea issue is joined, and the only facts put in issue thereby are the purpose for which the note was made and the absence of consideration for the endorsement to the plaintiff. At the trial it was admitted that the plaintiff is a holder without value, that, in fact, his name is used on behalf of the payees, and that the case must be considered as if they were the plaintiffs. Upon this admission being made, all that remained to be proved was the alleged purpose for which the note was made. The truth of the plea, in point of fact, was substantially established beyond dispute, not only by the evidence of the defendant, but also by that of Mr. Carter, one of the payees, with this addition, that subsequently to the making of the note, which was made as security for costs in respect of services *to be* rendered, no such services were in fact rendered, for the reason, as I presume, that the defendant, immediately upon being discharged in respect of the first charge mentioned in his plea, removed beyond the limits of the Province of Quebec.

That an attorney cannot, according to the law of England, take a valid security from his client for costs in respect of future services as an attorney, is a proposition which cannot admit of any question. Lord Eldon thought it so clear that he would not permit it to be argued. Lord Lyndhurst declared it to be the settled rule that no such security could be taken, and Lord St. Leonard's considered the point established beyond the reach of controversy: At the trial the payees, although admitting themselves to be practising attorneys, insisted that the services contemplated to be rendered, and for which they admitted the note was given, were services as counsel or advocates, which they are as well as attorneys; and it is said to be

the invariable practice for professional men in the Province of Quebec to insist upon full payment in advance in criminal matters, for the reason that, as was stated, there is no tariff of fees to attorneys for services in criminal matters in that Province, and the Courts do not entertain an action at the suit of a counsel, upon a *quantum meruit*, for professional services, and the taking a note to secure payment is quite an exceptional proceeding. In this view of the admitted purpose of the note, the contention is that in the Province of Quebec the contract by a counsel to render such services is a good consideration for the note.

If I was called upon to decide whether by the law of the Province of Quebec, a note made for such consideration can be recovered upon in an action by the payees, I should require to be furnished with better proof of the existence of such law, in point of fact, than has been adduced; for although we are aware that in that Province the old French law prevails, still, unless there be some special statute or ordinance sanctioning the dealing, I apprehend that the rule established in England is to be traced to the same ancient fountain from which the French law also takes its rise. In the case of *Kennedy v. Broun* (13 C. B. N. S.), where the whole subject is so learnedly and exhaustively considered, Erle, C. J., in giving judgment, says: "We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before or during, or after the litigation, has no binding effect; and furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation." And again: "In England, the general usage is *prepayment*; on the Continent, under the Roman law and the modern French law, and in some exceptional cases in England, the fee is paid after the service; but the nature of the fee is not altered by the time of payment." And again: "Throughout the whole growth of the civil law, from the foundation of Rome to the Digest of Justinian, not only was the advocate always under incapacity to

make any contract for his remuneration, but also throughout a part of that time he was under prohibition from receiving any gain for his services. Whether the name be *donum* or *honorarium* or *merces*, is immaterial—the substance of the law was invariable, *he never could contract for merces*, though during part of the time he might lawfully accept a *donum*.” And again, quoting from the Digest, (Lib. 50, Title 13): “Section 12 relates to securities and bargains for fees, and gives the rule when a suit can be maintained thereon: the effect seems to be that a promise while the litigation is pending does not bind; but a security given, after the cause is at an end, may be enforced, if the sum secured, together with the sums paid, do not exceed the legitimate amount.”

But the question whether the law of the Province of Quebec does or not make valid the contract in contestation here, which was made in that Province, does not arise upon the issue joined, and this point was taken at the trial and in argument before us. Regarding the payees as the plaintiff's, the only point in issue is whether or not the purpose of the making the note was as pleaded? This issue opens no evidence of the fact of the law prevailing in the Province of Quebec, nor that the contract sued upon is by that law valid, and the consideration unimpeachable. By our law the contract is invalid, and founded upon no sufficient consideration, if the matters pleaded are true: their truth is all that the plea puts in issue. If by the law of the Province of Quebec the consideration alleged, although the true consideration upon which the note was made, is a good, valid, and sufficient consideration, that law and its effect should have been specially pleaded as matters of fact, before evidence of those matters could be admissible. *Benham v. Lord Mornington* (3 C. B. 133); 1 Ch. Pldg. 238, 7th Edition; *Bradlaugh v. De Rin* (L. Rep. 3, C. P. 538); are quite in accordance with this rule.

There the action was brought on a bill of exchange, by an indorsee against acceptor, to which there was a plea traversing the endorsement. Now a traverse of the

endorsement involves not only the fact of the signature on the back of the bill, but also a delivery with intention of transferring, and it imports an actual, valid transfer of the property in, and the right of action on, the bill: *Marston v. Allen* (8 M. & W. 494); *Brind v. Hampshire* (1 M. & W. 365); *Law v. Parnell* (7 C. B. N. S. 282); *Bullen and Leake* 522, note *a* and cases *ibi*. Now the question of a valid transfer of the right of action on the bill, opens the enquiry, where the bill was endorsed; and if in a foreign country, then it opens the enquiry, whether the endorsement was or not valid and effectual by the law of the foreign country where the alleged endorsement was made. All these points are naturally involved in the traverse of the endorsement. So, on a plea of *nil debet*, to an action of debt, on a contract which when produced proved to be a contract made and to be performed in a foreign country, the *lex loci contractus*, and its sufficiency to create the debt charged, were necessarily in issue: *Way v. Yalley* (2 Salk. 651). But whether or not a note or bill, the consideration of which is impugned by a special plea, setting forth the only alleged consideration, is or not a note or bill to be governed by the laws of any, and if any, of what foreign country; and whether or not, by the laws of that country, the consideration alleged is good, valid, and sufficient to support the contract involved in the bill or note sued on, are matters not at all involved in an issue joined only as to the truth, in fact, of the consideration, as alleged in the plea. I entertain, therefore, no doubt that the verdict should be entered for the defendant, upon the issue joined on the second count.

GALT, J., concurred.

Verdict to be entered for defendant on second count.

HIGGINS V. LANGFORD.

*Landlord and tenant—Duration of tenancy until proceedings in equity taken—
Distress after lapse of six months from proceedings taken.*

Defendant let to plaintiff certain premises "for the term of one year, to be computed from the 1st October, 1863, and so on from year to year, unless notice is given to the contrary, or equitable proceedings taken on mortgage hereinafter mentioned." Plaintiff continued to occupy under this lease, and in May, 1867, sub-let to one P. for one year, with right to P. to pay his rent to defendant. On 10th January, 1868, a Bill in Chancery was filed on the mortgage. In May following P. paid rent to defendant up to the expiration of his year, and on the ensuing 25th July or August, defendant distrained upon plaintiff for arrears of rent before the demise to P., and for rent from its expiration to 1st July, 1868:

Held, that there was no tenancy subsisting at the time of the distress to justify the same, and that the payment of rent by P., after the commencement of proceedings in equity, did not create a new tenancy, as there was no evidence that P. had paid at plaintiff's request.

This was an action of replevin, tried at Chatham, in November, 1869.

The facts appeared to be that the plaintiff was seised of the equity of redemption of the premises on which the distress was made, subject to a mortgage held by Langford; that Langford had brought an ejectment on the mortgage against the plaintiff and recovered judgment, after which, on 9th November, 1863, he made a lease to him of the premises, "for the term of one year, to be computed from the 1st day of October, 1863, and so on, from year to year, unless notice is given to the contrary, or equitable proceedings taken on mortgage hereinafter mentioned." Under the terms of this lease the plaintiff continued to occupy the premises, and on 17th May, 1867, made a sub-lease thereof to one Pegley, for the term of one year, in which a stipulation was contained that Pegley might pay his rent to defendant. On 10th January, 1868, a Bill in Chancery was filed to foreclose the mortgage. On 30th May, 1868, Pegley paid rent to defendant up to 17th May, 1868, and on 25th July or August, 1868, the distress complained of was made for arrears of rent accrued due before the lease to Pegley, and for rent from the expiration of that lease to 1st July, 1868.

The jury found a verdict for defendants as on a subsisting tenancy.

In the following Michaelmas Term, *Anderson* obtained a rule for a new trial, without costs, on the ground of misdirection, in ruling that there was evidence to support the avowry, as no tenancy to support a distress was established; and for non-direction, in not leaving the question of tenancy to the jury; and on the ground that the verdict was contrary to law and evidence, there being no evidence of any tenancy between the plaintiff and defendant to justify a distress.

Robinson, Q. C., shewed cause, contending that the fact of rent having been paid by Pegley after the distress was equivalent to payment by Higgins, and Higgins resumed possession, thus creating a new tenancy after the filing of the bill; and that the filing of the bill was not a determination of the tenancy, but only amounted to a notice.

He referred to *Pitcher v. Donovan*, 1 Taunt. 555; *Doe Webb v Dixon*, 9 Ea. 16; *Werall v Smalley*, 1 Wils. 26.

Anderson, contra, cited *Woodfall*, L. & T. 266.

GALT, J., delivered the judgment of the Court.

The question now before us turns on the point whether there was, at the time of the distress complained of, a subsisting tenancy on the part of the plaintiff, as tenant to defendant, Langford, to justify the distress complained of, or whether six months had not elapsed since the termination of the previous tenancy.

The question is, what effect had the filing of the bill to foreclose upon the tenancy created by the lease of Nov. 1863; because, if by the terms of the lease the tenancy was to cease upon that step being taken, the distress was too late, having been levied more than six months after "equitable proceedings taken on the mortgage." It was argued by Mr. Robinson that the filing the bill might be treated as a notice to put an end to the tenancy, and that therefore the tenancy may be considered to have existed at the date of the distress, as a mere notice could not have

put an end to the tenancy until the expiration of the current year; but we must look at the words of the lease to ascertain what was the intention of the parties when they made that agreement. It is well established that the words, "for one year, and so on from year to year, unless notice," &c., constitutes a tenancy for two years certain (see *Woodfall*, p. 179); consequently we cannot suppose that the stipulation respecting the taking of equitable proceedings was intended to have no other effect in putting an end to the tenancy than a notice would have had, for the reason that no notice (which we assume means the ordinary notice) could have been given within the first year that would have terminated the tenancy before the expiration of two years. It was also urged that, admitting the tenancy under the lease to have been determined by the taking equitable proceedings, a new tenancy from year to year had been created by reason of the sub-tenant, Pegley, having paid rent after the filing of the bill. By the terms of the sub-lease it was, as before stated, agreed that Pegley might pay the rent to Langford, and there was no evidence that any payment made by him, after the filing of the bill, was made at request of plaintiff. We think that this argument also fails. The rule will therefore be made absolute.

Rule absolute.

GRANT V. WINSTANLEY ET AL.

Accommodation note—Indorsement after maturity contrary to agreement, and with notice—Want of notice of dishonor—Equitable pleading.

To an action against the maker and endorser of a promissory note, the maker pleaded, on equitable grounds, first, that there was an agreement not to negotiate the note after maturity; that the note was first indorsed to the plaintiff, as in the declaration alleged, after maturity, with notice of its being an accommodation note; and thirdly (the second plea not coming in question), that the note was indorsed by the payee during currency to one R., who had notice of its being an accommodation note, and that defendant was only security for the payee; that R. held it till, at and after maturity, but did not notify the payee as indorser, who never received notice, and defendant was thereby discharged; and that the note was indorsed to plaintiff after maturity, with notice that it was an accommodation note:

Held, on demurrer, that the first plea was good, but the other bad.

DECLARATION, against maker and indorser, on a promissory note.

Pleas (by maker)—1. On equitable grounds, that the note was made for the accommodation of the indorser, and without value or consideration, and upon an express understanding and agreement between maker and endorser that the note should be paid and retired by indorser at maturity, and should not be negotiated after maturity, and said agreement absolutely restrained the negotiation of said note after the same should become due, and said maker made same on the faith of such understanding and agreement; that there never was any value or consideration for the making or payment of said note by said maker; and said note was first indorsed to plaintiff, as in the declaration alleged, long after the same became due, in fraud of said agreement, and with notice that same was an accommodation note.

There was a second plea, not demurred to.

3. On equitable grounds, that the note was made for the accommodation of, and as surety for the indorser; that note indorsed to one Redford, with notice, and no notice of dishonor given to defendant Winstanley before said indorsement to plaintiff, as alleged in the declaration, and before said note matured the defendant Winstanley (the

indorser) indorsed said note to one Redford with notice, and that no notice of dishonor was given to the indorser, whereby the maker became discharged; and that said note was first indorsed to plaintiff long after maturity and after failure to give notice of dishonor, and with notice of its being an accommodation note.

Demurrer to 1st plea.—1. That in said first plea no allegation that plaintiff had any notice of agreement made between defendants that said promissory note should be paid by the indorser at maturity, and restraining the negotiation of the same after maturity. 2. That said first plea did not shew circumstances under which a Court of Equity would grant a perpetual and unconditional injunction against the plaintiff's claim.

Demurrer to 3rd plea.—1. That under the circumstances set forth in said plea, the indorser was not entitled to notice of dishonor, and the failure to give such notice did not discharge the maker. 2. That the alleged failure to give notice of dishonor to the indorser did not discharge the maker. 3. That it did not appear that plaintiff had any notice of the alleged failure to give notice of dishonor of said promissory note to the indorser, when the same was indorsed to plaintiff, or at any other time. 4. That it did not appear from the said third plea that Redford, the alleged immediate assignor of plaintiff of said promissory note, could not have maintained an action thereon against the maker. 5. That said plea did not shew a case for a perpetual injunction.

Harrison, Q.C., for the demurrer, cited *Carruthers v. West*, 11 Q. B. 143; *Parr v. Jewell*, 16 C. B. 684; *Greenough v. McLelland*, 2 E. & E. 424; *Perley v. Loney*, 17 U. C. R. 279; *Thompson v. McDonald*, 17 U. C. R. 304.

Anderson and Palmer, contra, cited *Byles on Bills*, ed. of 1866, 162, 238, 239; *Watts v. Shuttleworth*, 5 H. & N. 235; *Pledge v. Buss*, 1 John. Chy. Rep. 666, 667; *Calvert v. The London Dock Co.*, 2 Keen, 638; 26 Vic., ch. 45, secs. 2, 3.

Harrison, in reply, cited *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390.

HAGARTY, C. J.—The first plea says that the note was first indorsed to the plaintiff, as in the declaration alleged, after it became due, with notice of its being an accommodation note, and of the agreement not to negotiate it after maturity. It might be that the note had been negotiated while current, and had passed through several hands before reaching the plaintiff, who, although he had notice of the facts, might fully shelter himself under the title of a previous *bonâ fide* holder.

When the indorsement is in blank, as stated in note, *Bullen and Leake* (ed. 1863), page 80, “the plaintiff may declare as the immediate indorsee of the first or any intermediate indorser. The indorsements not stated must be struck out at the trial, and the remedy against these indorsers is lost. Indorsements stated, though unnecessarily, must be proved, if denied.” Again, “When the title is traced through several indorsements, the plea must invalidate the title of each indorsee down to the plaintiff, inclusive,” &c., &c.

Byles on Bills (ed. of 1866, 149): “The plaintiff may omit to state in declaration all the indorsements after the first indorsement in blank, and aver that the first blank indorser indorsed immediately to himself. In this case, however, all the intervening indorsements should be struck out.” See also *Chitty* on Bills (10th ed., 174) to same effect.

We must therefore, I think, assume it to be true that the note was first indorsed after maturity: See, as replying a different title from that averred in declaration as a departure, *Bartlet v. Benson* (14 M. & W. 738).

The point, then, is this, the present plaintiff has taken this note after it became due, giving value for it as we may assume, it not being denied, with notice of its being an accommodation note. If so, he took it subject to “its equities.” The defendant urges that there was a special agreement that the note should not be negotiated after

maturity, and that it was indorsed to plaintiff in fraud of that agreement. He had no notice of any such agreement, and the case turns on that being an equity attaching to it, and binding on him.

In *Carruthers v. West* (11 Q. B. 143) plaintiff was indorsee of a bill drawn by Sewell on defendant, and accepted by him to Sewell's order, indorsed by Sewell to Barclay, and by the latter to plaintiff. Plea, that acceptance was for accommodation of Sewell and Barclay, without value, and acceptance was on the condition that bill might be indorsed for accommodation of Sewell and Barclay, only before maturity, and not afterwards; that it was indorsed to plaintiff without defendant's privity or assent, after maturity, and plaintiff was not holder, nor had any interest or title till after maturity. Replication, *de injuriâ*; and, after verdict for defendant on a motion for judgment *non obstante*, the plea was held bad: no reasons are given for the judgment. Wightman, J., said during the argument, "When Barclay got the bill, he had power to transfer it and give a title: it is consistent with the plea that Barclay endorsed to some one before maturity, who after maturity transferred to plaintiff." Counsel said, "That should be shewn." Wightman, J.: "Should not your pleading exclude it?" On this latter point the present case differs in this, that the only endorsement averred is by payee to plaintiff. In the case cited there was an endorsement by payee to Barclay, who, as Wightman, J., says, might have given a good title while bill was current.

Parr v. Jewell, in Error, (16 C. B. 684), favours defendant's view. The law is very much discussed in the long argument; the judgment is very brief. The defendant was acceptor of a bill for accommodation of drawer; at maturity the bill was given up by the holder to the drawer, who gave another bill for it, but indorsed over the original bill to the plaintiff. The facts are complicated, and do not resemble those now before us. In the course of the argument, Alderson, B., says, "The party who takes a

bill under circumstances like these, takes it subject to all the equities attached to it. Was not its non-negotiability one of its equities?" In giving the short judgment directing a *venire de novo*, the same Judge says, "We think, under the circumstances stated in this bill of exceptions, there was evidence for the jury of an engagement on the part of Allen (the drawer) not to negotiate the bill after it became due."

Byles on Bills, was largely cited in argument: the 6th Edition is that referred to: "It is now, however, clear that an original absence of consideration, such as arises in the case of accommodation acceptances, will not defeat the title of an indorsee for value of an overdue bill or note, although the indorsee had notice of the fact when he took the bill, unless there was an agreement, express or implied, restraining the negotiation of the bill or note after it should become due." In the 9th Edition, of 1866, the sentence reads, "*It now, however, seems that, &c.*" To the passage in both editions the same cases are cited: *Sturtevant v. Ford* (4 M. & Gr. 101); *Lazarus v. Cowie* (3 Q. B. 459); *Stein v. Yglesias* (1 C. M. & R. 565).

In *Chitty on Bills*, 10th Edition, (1859) 154, it is said: "It would seem that want of consideration between the original parties to the bill is not one of those equities which attach to it when it is indorsed after maturity, unless, perhaps, where there is an agreement, either express or implied, not to negotiate the bill after it becomes due."

In *Stein v. Yglesias*, Parke, B., says: "There is nothing whatever to lead to a conclusion that the defendant (the accommodation acceptor) intended to limit the negotiation of the bill to the time before it became due. You had better amend and plead all the necessary facts to exclude a right in the person accommodated to negotiate the bill after it became due." It was not averred that the holder had not given value or had notice of any thing.

Sturtevant v. Ford, was somewhat similar in facts: the plea was held bad. Coltman, J., says: "There is no reason why a bill may not be negotiated after it is due, unless

there was an agreement for the purpose of restraining it. But if there had been such an agreement, it should have been stated in the plea, and it might have been a defence; but that is not so here." Cresswell and Erskine, JJ., speak to the same effect.

Lazarus v. Cowie, turned on the Stamp Acts. Lord Denman says, "In *Charles v. Marsden* (1 Taunt. 224), it was held to be no defence that a bill was an accommodation bill, and indorsed to plaintiff after it became due, unless it had been shewn also that it was agreed not to be indorsed after due."

The case referred to in *Taunton* is to the like effect; no judgment on the point before us. Lawrence, J., uses language almost identical with that already cited as used by Sir Thomas Coltman.

I think, on the whole, that our judgment should be for defendant on the first plea.

The third plea sets up an indorsement by payee, during currency, to one Redford, who had notice of its being an accommodation note, and that defendant was only surety for payee; that Redford held it till, at and after maturity, but omitted to notify the payee, as indorser, and he never received notice, and that defendant was thereby discharged; that it was endorsed to plaintiff after maturity, with notice that it was an accommodation bill.

It would be a defence to shew that time was given, for a good consideration, to the actual principal, without the surety's consent; or that the actual principal was discharged; or that, in certain cases, a security was released, or any act done, substantially to the prejudice of the surety, without his consent. It seems also clear that the surety is entitled to the benefit of all securities held by the creditors, on his paying the latter. The defence here is, that by not notifying the indorser of the notes dishonored, the defendant, the maker, lost his remedy thereon; that, in fact, he was deprived of the benefit of the note as a security. I think this is a fallacy. The defendant, the maker, could never sue at law upon the note; his only remedy would be for money paid for indorser's use.

The defence is on equitable grounds. If the facts in this plea were set forth in a bill in equity, it would shew that the payee and indorser, Winstanley, was the principal, and, as it were, the maker, and the other defendant, the apparent maker, merely a surety and indorser. Notice to the nominal indorser, but real maker, would be unnecessary, and defendant could not be heard asking for equitable relief on a statement of the true and not the apparent facts of the case, and then seek to gain an advantage by alleging that the opposite party had treated the case as it really was, and not as it appeared to be. If the plea be a good equitable defence, it seems to render unnecessary the notice of dishonour, now complained of as not being given. I incline also to think that the plea is bad on the objection urged by Mr. Harrison, that it does not aver that Winstanley was, in fact, discharged by the want of notice, as he might have waived it. It is to be regretted that so much expense and time should be wasted in resisting a plain obligation on a promissory note, by two independent defences, both extremely ingenious, but one or other of which must necessarily be untrue.

GWYNNE, J.—What the plaintiff states in his declaration in substance is, that he is the holder of the note sued on, and that his title consists in the endorsement of it by the payee to him. To this the defendant (the maker), in substance, pleads, that although true it is the plaintiff's title does consist in an endorsement to him by the payee, yet that such endorsement was made after the note had become due, and that it was a note made by him (the maker) for the accommodation of the payee, of which the plaintiff had notice when he took the note; and moreover, he says, that the note *was made upon the express agreement* by the payee that it should not be negotiated after its maturity.

Now, for the purpose of this argument, it is admitted that the note was made upon the express agreement that it should not be negotiated after maturity, and that therefore such negotiation of it would be a fraud committed by

the payee in violation of that agreement. It is further admitted that the payee did negotiate it, after it became due, by endorsement to the plaintiff, who had notice then that the note was an accommodation note, and that the plaintiff's title consisted in such negotiation of the note as, in fact, was a fraud committed by payee on the maker. It is admitted therefore, in substance, that the plaintiff's title consists in a negotiation of the note after it had been divested, in truth, of its negotiable property. Consistent with this plea it might be that the facts are that the note having been negotiated before maturity was taken up by the payee, whose duty it was to take it up at maturity, and that it was received by him after its maturity, and after it had exhausted the purpose of the agreement upon which it was made, and had, in fact, got home. But the plea admitting that the transfer, in virtue of which the plaintiff claims title, was made by the payee after maturity, and that the plaintiff had notice of the note being an accommodation note, we must, I think, upon the authority of the cases referred to by the Chief Justice, hold that the express agreement not to negotiate after maturity, upon the faith of which the note was made, is an equity attached to the note, subject to which the plaintiff holds it, and therefore cannot sue upon it. See also *Holmes v. Kidd* (3 H. & N. 891), and *In re European Bank, ex parte Oriental Commercial Bank* (L. Rep. 5 Ch. Ap. 388).

The third plea, which has also been demurred to, is in my opinion, insufficient in law. The defendant's (the maker's) contention involves also, it appears to me, a singular confusion of the principles of law and equity with each other. The plea is pleaded upon equitable grounds, and it claims that under the circumstances pleaded the defendant is entitled to be regarded in equity as a surety, and Winstanley as principal; and, while claiming the benefit of his equitable position as principal, he objects that the plaintiff has not treated the payee of the note in *his legal* position of surety, but has, in fact, so acted as if he held that position of principal, which the defendant insists that in equity he does

hold. Further, the defendant's contention is, that as a surety in equity he would be entitled, upon payment, to a transfer of all securities which the creditor holds; but he must take those securities according to their existing character and subject to all their legal incidents, and if the note, which is the security referred to, should be assigned to him on payment of it, he could have no action upon it against Winstanley, whether notice had or had not been given to him. The defendant, in effect, asks to be relieved, on equitable grounds, from *his* liability on the face of the note, because Winstanley has not had notice, although his not having had notice cannot prejudice the defendant, either at law or in equity. The principle of equity which the defendant invokes would seem to shew that Winstanley could not, if so disposed, which, by the way, no where appears, relieve himself from liability for want of the notice. It is a good excuse for not giving notice of dishonor to the drawer of a bill, that the bill was accepted solely for the accommodation of the drawer: *Bickerdike v. Boleman* (1 T. R. 405); *Walwyn v. St. Quintin* (1 B. & P. 652); *Cory v. Scott* (3 B. & Al. 619). Now, if the facts alleged in this plea be true, as we must take them to be, there is abundance of reason shewn, upon the principle of those cases, and of *Carter v. Flower* (16 M. & W. 743), why, to a properly framed declaration, Winstanley, who had undertaken, with the defendant, (the maker) to protect him, and to pay the note at maturity, and who is in substance the real maker, could not object that he was relieved from liability by want of notice, the note having been dishonored by the real surety.

GALT, J., concurred.

Judgment for defendant on demurrer to first plea, and for plaintiff on third plea.

SHAW V. MASSIE.

Insolvency—Composition and discharge by majority of creditors—Pleading.

To an action on a promissory note and on the common money counts, defendant pleaded, 1st, that after making of note and incurring of liability he became insolvent, and a deed of composition and discharge, under the Insolvent Act of 1869, was entered into and executed by a majority of creditors, whereby defendant was discharged, which discharge was confirmed by the County Court Judge; 2nd, after making of note defendant became insolvent, assigned to an official assignee, and duly set forth plaintiff's claim, which plaintiff duly proved, after which a majority in number of creditors consented in writing to a discharge, which was duly confirmed, &c. *Replication*, to first plea, setting out the deed of composition, acknowledging the receipt from assignee of defendant's estate, of certain promissory notes, indorsed, for certain amounts, and payable at certain dates, and accepting same in payment, and stating that the creditors therein named (of whom plaintiff was not one) accordingly discharged him, and authorized the restoration of the estate to him.

Replication to 2nd plea, that the alleged consent in writing was the deed of composition and discharge in the above replication set out, and that, in pursuance of said deed, said assignee restored to defendant his estate.

Replication, on equitable grounds, that the composition was not made in good faith, nor for as large an amount as it should have been, as defendant well knew.

Held, on demurrer, that the replications to the 1st and 2nd pleas were good, and that the first plea was bad; that the 2nd plea was not open to the objections taken to it, set out below, though, *quære*, whether good in all particulars against objections not taken.

Held, also, that the equitable replication was bad.

DECLARATION on a promissory note for \$2,303.74, and on the common counts for goods bargained and sold, sold and delivered, work and materials, &c.

Pleas.—1. That after liability incurred, defendant became insolvent within the Act of 1869, and, made a composition deed which was executed by a majority of creditors, whereby defendant was discharged, which discharge was confirmed by the Judge of the County Court of Wellington, who granted a certificate of said confirmation.

2. That after the making of the said note defendant became insolvent within the Act of 1869, and assigned to an official assignee, and duly set forth plaintiffs' claim, and plaintiffs duly proved their said claim, after which a majority in number of the creditors of defendant, for sums

of \$100 and upwards, and representing at least three-fourths in value of the creditors of defendant, consented in writing to his discharge, which was duly confirmed by the County Court Judge.

Replication, to first plea, setting out the said composition deed as follows: "We, the undersigned, acknowledge the receipt of promissory notes, endorsed, for 15s. in the £, payable in 6, 12, and 18 months, from February 9th, 1870, and accept the same in payment, and accordingly discharge him, and authorize the estate to be given back" to defendant (with a list of names subscribed, among which the plaintiff's did not appear).

Replication to second plea, that the alleged consent in writing was the deed of composition and discharge in the second replication set out, and that after the making, and in pursuance of the terms of said deed, said assignee restored and re-conveyed to defendant all his estate and effects.

Replication, upon equitable grounds, that the said deed of composition and discharge, and said consent in writing, were the deed in second replication set out, and no other deed or consent, and that the composition therein provided for was not made in good faith, and was not of so large an amount as the estate of defendant was reasonably sufficient to pay; but said estate was reasonably sufficient to pay a much larger composition, and defendant could, and well knew that he could, at the time of making said deed, have paid or secured to his creditors a much larger composition.

Demurrer to replication to 1st plea.—1. No answer; neither denying, nor confessing and avoiding. 2. No defect in deed shewn, nor invalidity in discharge.

Demurrer to replication to 2nd plea.—1. No answer; neither denying, nor confessing and avoiding. 2. Not shewn that consent or Judge's discharge was invalid. 3. Not shewn when estate was re-conveyed.

Demurrer to equitable replication.—1. Uncertain, and no tender of distinct issue. 2. No answer to pleas; discharge not shewn invalid. 3. Fraud not shewn in obtain-

ing of deed, consent, or order. 4. Discharge not shewn invalid.

Exceptions to 1st plea.—1, Not shewn that any composition was provided for plaintiff; 2, or that deed was made between defendant and his creditors; 3, or that it contained release by all creditors; or how deed affected plaintiff or his debt.

Exceptions to 2nd plea.—1, Not shewn that any consent under Act of 1869 was given; 2, or any consent other than by the deed; or that any consent to a discharge other than by the deed of composition was given; 3, or that this debt was of a class that could be discharged under the Act.

C. S. Patterson (Rose with him), for the plaintiff, cited *Yates v. Nash*, 8 C. B. N. S. 581; *Re Rawlings*, 7 L. T. N. S. 582; *Woods v. Foote*, 1 H. & C. 841; *Ex parte Cowen*, L. R. 2 Chy. App. 563; *Hart v. Smith*, L. R. 4 Q. B. 61.

M. C. Cameron, Q.C., and *McMichael*, contra, cited *Smith v. King*, 19 C. P. 319.

The sections of the Insolvent Act relied on are referred to in the judgment.

GWYNNE, J.—The first point we have to consider is, whether or not the replication to the first plea is a sufficient answer to that plea, assuming it to be a good plea in bar, until displaced. This point turns upon the answer to be given to the question, whether the deed, which is set out in the replication, is a good composition deed within the 94th section of the Insolvent Act of 1869, so as to be binding upon the plaintiff, and to bar the present action.

The first paragraph of the 9th section of the Insolvent Act of 1864 enacted that the discharge agreed to in a composition deed should have the same effect as an ordinary discharge obtained as thereafter provided. The 3rd sub-section of section 9 was the only one which declared what the effect of a discharge should be, and it is the same as is now contained in the 98th section of the Act of 1869 in relation to a consent in writing to a discharge.

In *King v. Smith* (19 C. P. 319) we held that a discharge in insolvency did not bar the action of a creditor who had not been entered as a creditor in the schedule annexed to the deed of assignment, and when his claim did not appear in any list subsequently furnished to the assignee.

The words in the 9th section of the Act of 1864, which declared what the effect of a discharge agreed to in a deed of composition should be, are wholly expunged from the Act of 1869, and it is left now to the Court to say what the effect of such a discharge shall be under the provisions contained in the 94th section of the Act.

That section enacts that "a deed of composition and discharge, executed by a majority in number of those of the creditors of an insolvent, who are respectively creditors for sums of \$100 and upwards, *and who represent at least three-fourths in value of the liabilities of the insolvent, subject to be computed in ascertaining such proportion,* shall have the same effect with regard to the remainder of his creditors, and be binding to the same extent upon him and upon them as if they were also parties to it."

Now, in the first place, the deed, to have any effect under the Act, must be a *deed of composition*, that is, a deed containing a mutual agreement between the debtor and his creditors for the discharge of the debtor's debts; that is, *all* his debts, in terms or by means different from those required by the original contracts. The Act, which is passed for the equal distribution of the insolvent's estate among all his creditors, cannot contemplate such an injustice as that any composition should be effectual to bind persons not assenting which does not provide *equally* for the satisfaction of *all* the creditors, whatever may be the proportion of the proposed composition to the original debts which the majority may agree upon.

The effect then is, that the discharge of an insolvent agreed upon in a deed, which provides for and secures an equal *pro rata* composition of all the liabilities of the insolvent, and which deed is executed by a majority in number of the creditors of the insolvent, who are respec-

tively creditors for \$100 and upwards, each, in respect of liabilities subject to be computed as by the Act is provided, and who represent, at least, three-fourths in value of all the liabilities of the insolvent, subject to the provisions of the 119th section, shall have *the same effect* with regard to the remainder of the insolvent's creditors, for whom such equal ratable composition is so provided and secured; and that the deed shall be binding, to the same extent, upon the insolvent and upon such remainder of his creditors not executing the deed, as if they were, in fact, parties to it, executing it. Suppose the case of some of an insolvent's creditors being purposely or negligently omitted by him from all lists of creditors furnished by him, and that they were still left out and excluded from all consideration in a composition made by the insolvent with all his other creditors, and that no provision whatever should be made for composition with them, it would be contrary to the plainest principles of justice, and to the whole spirit of the Act, to hold that such creditors so omitted should be barred of their actions by the discharge agreed upon in a deed of composition so executed, notwithstanding that it might be confirmed by a Judge.

It was argued that the discharge, being confirmed by the Judge, has, by the operation of the 104th section, become fixed and conclusive, and that it is not competent for the plaintiff now to make any objection to the deed. I can understand the propriety of providing that a discharge, when confirmed, shall, finally and conclusively, be taken to have been executed by the proper proportion of creditors necessary to give it any validity; but I cannot imagine that the Legislature contemplated that a confirmation by a judge should give to a deed, or consent in writing, any greater effect than is provided for in the deed or consent itself, or in the clauses of the Act prescribing their effect. As to a discharge by consent, in writing, without composition, the 98th section declares what effect *it* shall have, namely, that effect which we decided in *Smith v. King*, that every discharge had by the Act of 1864. The con-

.

firmation of such a discharge can give it no greater effect than the 98th section declares, and such a discharge cannot bar the remedy of a creditor, whose name as a creditor has not been furnished, as in the section provided. Upon such an ignored creditor the discharge has no effect. So in a deed of composition the discharge can have no effect at all to bind a dissenting creditor, unless he be provided for equally with the assenting creditors; and upon an *ignored* creditor the discharge agreed upon can have no effect; and for the nature of the deed, and for the purpose of determining whether it meets the requirements of the Act, we must look only to the deed itself. Now the deed in question does not, upon its face, shew that it is a deed of composition at all; that is to say, it does not shew that it is an agreement made with all the insolvent's creditors, or for the benefit of all. There is no obligation, in fact, at all imposed upon the insolvent as to the remainder of his creditors not executing the deed, of whom the plaintiff is one: he does not, in fact, execute the deed at all. No provision whatever is made *therein* for securing to the plaintiff any composition whatever upon his claim. In so far as appears, the insolvent may have wholly disputed the plaintiff's claim and his assertion of the position of a creditor. The deed merely shows that in consideration of 15s. in the pound, upon their claims, paid to *certain* creditors, they assume to release the debtor from all liability, as well to those receiving the composition as to those for whom no composition is provided; and they assume, further, to surrender to the insolvent all his estate in insolvency, freed and discharged of all claims of his unsatisfied as well as of his satisfied creditors. Such a deed can never be construed to be a deed of composition within the meaning of the Act, and a discharge therein agreed to can have no effect to bind or bar a creditor whose claim to rank as a creditor is so ignored that no composition is provided for him. As it is the composition provided for in the deed which gives effect to the discharge, a defendant, in order to avail himself of a discharge

contained in a deed of composition, should, as it seems to me, plead the deed, accompanied with appropriate averments, shewing not only that the deed providing for the composition has been executed by the required proportion of creditors, but also that the plaintiff's composition has been paid to him according to the terms of the deed, or at least tendered to him, so that the Court may see that the deed is such a one as by the Act is binding upon the plaintiff, though not executed by him, and that its terms have been fulfilled.

It may be, as was suggested in the argument, that in this case, notes securing the plaintiff's composition, similar to those mentioned in the deed as received by the executing creditors, have been deposited with the assignee for the plaintiff; but I do not see how the plaintiff is to be bound by that, for it is to the deed, I think, that the non-executing creditor is to look for his security, and it should be framed in such a manner as *to be binding* upon the insolvent that the non-executing creditor shall receive his composition. I do not think that the deposit of a composition for the plaintiff, with the assignee, can bar the plaintiff, unless or until he shall receive it from him, or unless, at least, it is part of the agreement contained in the deed, that the composition for all should be deposited with the assignee; but to avoid all question as to such a provision being or not reasonable, in the event of the assignee himself becoming insolvent, or his appropriating the deposits, the safest course, undoubtedly, is to tender the agreed-upon compensation, or securities therefor, to all the creditors, and that the deed should be so framed as to be binding on the insolvent for its payment to all.

There are several cases decided in England under the 192nd section of the Bankruptcy Act of 1861, which, as it appears to me, are quite applicable as authorities in cases arising under the 94th section of our Act.

In *Walter v. Adcock* (7 H. & N. 541), Bramwell, B., said that a composition deed under that 192nd section, to be binding on creditors who have not executed it, *must appear*

upon the face of it to be a deed of which any creditor may have the benefit.

The words of Lord Westbury, in *Re Woodhouse, ex parte Morgan* (9 Jur. N. S. 561), relating to the same section, are, in my judgment, precisely applicable to the 94th section of our Act. He says: "I think it must be perfectly clear to any person who will examine the section, that it was intended to be applicable only to deeds which *contain provision for the benefit of all creditors.*"

If a deed, by express terms, or by implication, by not providing for a creditor, excludes him, such a deed cannot be a composition deed within the meaning of our Act. In *Re Rawlings* (9 Jur. N. S. 317) Lord Justice Turner says: "It is scarcely possible to suppose that the Legislature could intend that *all* the creditors should be bound by an arrangement which is partial and confined in its operation to some of them only. In all these cases, therefore, I think the question must be, *does the deed or instrument extend to all the creditors?*"

In *ex parte Cockburn* (33 L. J. Bank. 17, and 9 L. T. N. S. 465) the Lord Chancellor (Westbury) held that "a deed, to bind creditors who have not assented, must be one which places the creditors who do assent and those who do not assent, precisely on an equal footing in point of law."

In *Chesterfield Colliery Company v. Hawkins* (3 H. & C. 677), where a deed of composition was expressed to be made between the several persons whose names and seals are subscribed and affixed in the schedule, being creditors of the first part, the debtor of the second part, and two sureties of the third part; and by the deed, which was declared to be for the equal benefit of all the creditors, the parties of the second and third part covenanted with the parties of the first part and all the other creditors respectively, to pay them respectively a composition of 10s. in the pound, and in consideration of the covenants the covenanters released the debtor,—it was held that a non-assenting creditor was no party to this deed, and could not sue on the covenants, and that consequently he was not,

under the 192nd section, bound by the deed; and that a deed so framed will not operate under the Act, to make non-assenting creditors parties.

In *Benham v. Broadhurst* (3 H. & C. 472) a similar point was decided in the Exchequer Chamber. There it was held that a deed, under the 192nd section, was not binding upon non-assenting creditors, because that, containing a covenant with the executing creditors which they could enforce, it contained none with the non-assenting creditors, or with a trustee for them; and moreover, because the deed did not equally provide for all creditors, in this, that it contained a recital that the debtor was indebted to the executing creditors in the sums set opposite to their names in the schedule, by which the debtor was estopped from disputing the amounts; but there was no admission of the amounts due the non-assenting creditors, who, therefore, were in the position of being obliged to prove their debts.

The observations of Lord Westbury, in *ex parte Cockburn* (9 L. T. N. S. 466), are peculiarly applicable to the present case: "The power given by the Act to a certain majority of creditors, to bind and, in fact, to release the debts of the minority, in cases where there is no *cessio bonorum*, is, no doubt, a great and extraordinary power. It, of course, rests on the assumption that terms which so large a proportion of the creditors, both in number and value, are willing to accept from an insolvent, must be advantageous to the whole body of creditors; and this assumption necessarily implies that the terms agreed to are the same for all, and that those who bind and those who are bound, are in a situation of equality. When this is not the case, it seems to me that non-assenting creditors are not bound, according to the true intent and meaning of the Statute. If the names and debts of all the creditors who are not parties to, or have not assented, in writing, to the deed, had been included in distinct schedules, written under the deed, and the amount of the composition on such last mentioned debts had been deposited in a bank, or with

a trustee, for such last mentioned creditors respectively, with directions to pay the same on demand, *and if the debtors had also* respectively covenanted with the persons named in such schedules, that they, or the trustees respectively, should and would pay such composition on demand, it might, perhaps, have been reasonably concluded that all the creditors were, as far as possible, placed in a situation of equality."

In *Ilderton v. Jewell* (9 L. T. N. S. 815, 16 C. B. N. S. 142, in Error from 14 C. B. N. S. 665) it was held, in the Exchequer Chamber, that in a deed purporting to be executed under the 192nd section of the Act of 1861, it must appear on the face of the deed that the non-assenting creditors are equally provided for with those executing. See also *ex parte Glen* (L. Rep. 2 Ch. Ap. 670); *Tomlin v. Dutton* (L. Rep. 3 Q. B. 466); *Rixon v. Emary* (L. Rep. 3 C. P. 546), and *Allan v. Garrett et al.* (30 U. C. 165).

I am of opinion, therefore, that the replication to the first plea is sufficient, and that the plea to which it is pleaded is insufficient in law.

The second plea professes to set up a consent in writing, without composition, to a discharge under the 98th section. Under that section the estate of the insolvent remains to be administered by the Court in Insolvency, for the benefit of the creditors; and the consent, in writing, to a discharge, operates as a release of the debtor personally, the creditors accepting in satisfaction their remedy in the insolvency against the insolvent's estate.

The replication to that plea, in effect, is that the consent in writing, referred to in the plea, is the ineffectual composition deed set forth in the replication to the first plea, which is invalid within the 94th section, accompanied with an averment of the surrender to the insolvent, by the assignee, of all his effects, in pursuance of the direction contained in that deed. This replication is a good answer to the plea, as shewing that what is pleaded as a consent in writing, to a discharge, under the 98th section, is nothing of the kind, but is an ineffectual deed of composition,

invalid in law. As to the plea itself, I do not think it open to the objection made to it; but whether it would be held to be a perfect plea in all particulars, as against objections which have not been taken to it, I do not feel called upon to decide.

The replication, upon equitable grounds, in substance insists that the composition agreed upon not being, as is alleged, as much as the insolvent could reasonably have paid, constitutes fraud, so as to avoid the deed. If it had been averred that the insolvent procured the creditors to accept a much smaller composition than he could have paid, by fraudulently concealing some portion of his estate, as its value, that would be a ground to avoid the discharge; but, in the absence of such fraud, I can see nothing to prevent creditors agreeing to accept a smaller composition than the debtor, if hard pressed, might have been able to pay. I am of opinion that this replication is sufficient in law.

Judgment will be for the plaintiff on the demurrers to the second and third replications, which are to the first and second pleas respectively, and upon the objections to the first plea; and for the defendant upon the demurrer to the replication, upon equitable grounds.

HAGARTY, C. J.—For all that appears on the pleadings, the insolvent may have simply obtained the consent and discharge from a certain number of his creditors, whose names are attached to his deed, by giving to them certain endorsed notes. Nothing appears on the face of the instrument as to any provision for or protection of non-executing creditors. My brother Gwynne has pointed out very clearly the many objections to the defence pleaded.

It seems to me that every deed under the Statute ought on its face to shew the general scheme and arrangement for composition with the general body of the creditors.

The deed before us is unfortunately deficient in many points. It remains to be considered whether it can be supported by allegations meeting all the requirements of the Statute, *dehors* the instrument itself.

As it stands, I think the defence fails as to the deed set out. I also think that the consent to a discharge in the second plea mentioned cannot avail, for the reasons stated by my brother Gwynne.

The 192nd section of the Imperial Act of 1861 is hardly more precise in describing a deed of composition than our Act of 1869, and the decisions on that clause seem very applicable to the deed before us.

There remains the effect of the confirmation under the Act, which, it is said, is to be "final and conclusive." I do not think that on the pleadings before us we can hold the plaintiff barred by that provision.

I think the defendant should be allowed the opportunity of supporting his deed, as far as possible, by any averment of facts not appearing in it, as suggested in the judgment of my brother Gwynne. The defendant, if he amend, will do well to consider the cases cited, and especially *Ilderton v. Castrique* (14 C. B. N. S. 99, and again in Error, 16 C. B. N. S. 142, under the name of *Ilderton v. Jewell*.) The remarks of Blackburn, J., in Error, may be found suggestive.

GALT, J., concurred.

MOORE V. THE CORPORATION OF THE TOWNSHIP OF
ESQUESING.

Dedication of highway—User by public—Stoppage by by-law.

Where a road was laid out over land by the owners thereof, and was so used by the public, without interruption, for 30 or 40 years, *Held*, that it had become a public highway, and could not be stopped up by by-law of the municipal council, particularly at the instance of a purchaser from one of such owners of the land, with knowledge, too, on his part, of the existence of the road.

IN Michaelmas Term last, *McGregor* obtained a rule *nisi* to quash by-law No. 211, passed 25th July, 1870, to stop up the highway or allowance for road situated at or

near the limit between lots 31 and 32, 2nd concession of Esquesing, on the ground that the same was illegal under sec. 320 of the Municipal Act, and *ultra vires*, and on grounds disclosed in affidavits and papers.

A large number of affidavits were filed.

The by-law stated that the road between 31 and 32 was not an original allowance, nor had any compensation been given in lieu thereof, and enacted "that the travelled road through Mr. Cummings's land, situate on or near the limit between lots 31 and 32, 2nd concession of Esquesing, shall be and the same is hereby stopped up."

Lot 32 was the last lot in Esquesing, and the town line between Esquesing and Erin bounded that line on the north. The road stopped up ran on the south side of 32, between it and 31, the width of the lot being between the two roads, which were parallel. It ran from one concession to the other, east and west. But the portion stopped, *i.e.*, the portion through Cummings's land, was only half the depth of the concession between the east halves of 31 and 32; the remainder, between the west halves, was left open.

In April, 1836, it was sworn that Hamilton Walker was possessed of the west half of 31, Robert Bedford of the west half of 32, and Thomas McCoy of the east half of 32; that before that time the road between the east halves had been travelled; that a writing, produced, was then executed by Walker, Bedford and McCoy, in these words: "Whereas it is thought necessary that a road should be opened across the 2nd concession of Esquesing between lots 31 and 32 of the same, we, that is to say, Hamilton Walker, owner of the west part of 31, Robert Bedford, owner of the west of 32, and Thomas McCoy of 32, east of said 2nd concession, we, the above-mentioned Hamilton Walker, Robert Bedford, and Thomas McCoy, do promise and agree to give each a part for the purpose of opening the same; that is, Hamilton Walker one rod in width from the concession line, between 1st and 2nd to the centre of said 2nd concession; likewise Robert Bedford one rod in width from

line between the 1st and 2nd concession to the centre of said 2nd concession ; and Thomas McCoy two rods off his lot, if the owner of 31 should not be willing to give a part for the purpose of having said road opened. In witness, &c., set our hands, 12th April, 1836." (Signed by the three). It was sworn that when the writing was given, the whole was formally opened, and had ever since been used.

John Cummings, who petitioned for this by-law, and who had since its passing stopped up the road, owned 25 acres of the east-half of 32, off which McCoy, the former owner, thus dedicated the road. He also owned the east-half of 31 south of the road.

Harrison, Q. C., shewed cause, the defence set up for the by-law being that it was considered a private road and was only to be used till the town line was opened ; that the town line had been opened, and the municipality had also caused a road to be opened parallel to this road between lots 28 and 27, in 2nd concession, for the convenience of the public.

Cummings swore that in 1840 he purchased 31 in 2nd concession from one Jones, and his deed contained no reservation of any road : his lot was then wild. He did not deny but that the road in question was then in existence and used, but that eighteen or nineteen years ago, when he cleared up to the line, he made some alterations in the road, which was "accordingly moved to its present position. In 1846, he said, he bought the south-east 25 acres of 32 from Thomas McCoy, the deed containing no reservations ; that he always considered he had the right to stop the road, but said he did not intend doing so till the town line was opened.

It was also sworn that at different times when the pathmasters were doing statute labour on the road, he forbade them putting stones on it or making holes in it ; and his son swore the pathmasters submitted and did not do so, though it very clearly appeared that no attempt was ever made to exercise any right to obstruct or interrupt

the use of the road. His son also swore that most of the road was on the lot 31, bought from Jones, and only a small portion on 32, bought from McCoy.

A large portion of the affidavits on the defence went to shew that it would be as convenient or nearly as convenient for the persons residing west of the road to go round by the town line as to go straight to the east. This was strongly denied by the applicants.

McGregor and Guthrie, contra.

The following cases were cited : *Regina v. Plunkett*, 21 U. C. 536 ; *Borrowman v. Mitchell*, 2 U. C. 135 ; *Dawes v. Hawkins*, 4 L. T. N. S. 288 ; *Chapman v. Cripps*, 2 F. & F. 864 ; *Selby v. Gas Co.*, 30 Beav. 606 ; *Holmes v. Goring*, 2 Bing. 76 ; *Osborne v. Wise*, 7 C. & P. 61 ; *Carrick v. Johnson*, 26 U. C. 65 ; *Regina v. Phillipp*, L. R. 1 Q. B. 648.

HAGARTY, C. J.—It is clear that this road was not an original allowance, but has been a public travelled road for between thirty and forty years. The town line parallel to it being over rough land, remained for many years unopened till lately, and this road was used, it is sworn, as the regular highroad from Toronto to Guelph. Statute labour seems to have been usually done upon it, and the farmers to the west seem to have used it extensively as their road to Acton village and station.

It seems to me that the evidence of this road having acquired the legal character of a public highway is irresistible. It was first used as a road ; then we find the three owners, thirty-four years ago, in writing, declaring there was to be a road there, and each agreeing to give a portion of his land for that purpose. It is quite true that Jones, from whom Cummings purchased, in 1840, the east-half of 31, does not appear to have done anything in the matter, but McCoy, who owned 31 on the north of the Jones lot, agreed to give double the width given by the other two if the owner of 31 should not be willing to give a part for that purpose.

Then, in 1846, Cummings purchases from McCoy the south 25 acres of 31, off or along which McCoy, his grantor, had already appropriated the allowance for the road and dedicated it to the public as formally as he could.

It matters little, I think, that McCoy, in the deed to Cummings, did not expressly reserve this. The road was then open and travelled, and was always clearly in the knowledge and sight of Cummings, who then owned on both sides of it.

His declared opinion that it was only a private road or that he had the right to stop it or would stop it when the town line was made passable, cannot avail. It could not matter much to him that most of the road may or may not be on the McCoy part. When he took from McCoy the latter had dedicated two rods wide off his lot for this road.

The evidence also as to statute labour being usually done on it is clear.

I think the case of *Regina v. Plunket* (21 U. C. 536) cannot help the defendants. It was what was called "a trespass road," running diagonally across some lots on the Humber plains; in the view of the Court "only a temporary substitute for the proper allowance, which ran alongside of the lot," and that there was not sufficient evidence of dedication.

It cannot be pretended that this road comes under the class of "trespass roads," running as near perhaps as the irregularities of the ground of the public allowance for road will permit, or of the "short cuts" often made across unenclosed land and used for years by the public with the permission of the owner till he finds it convenient to fence in his property and leave the public to the legal allowances. See also *Borrowman v. Mitchell* (2 U. C. 155.)

All such cases should be dealt with in a liberal spirit and with a due regard to the customs and necessities of a new country, where roads are in their infancy and much land unenclosed.

Here the origin of the public user and the express dedication by the owners is established.

In *Dawes v. Hawkins* (8 C. B. N. S. 848) an adjoining proprietor had illegally stopped up an ancient highway without interference by the owner of the soil. He substituted for it a new road which the public used over twenty years; then the obstruction on the ancient road was removed, and the owner of the soil of the substituted road shut it up.

Sir W. Erles's judgment fully discusses the law. He held there was no sufficient user of the substituted way, from which a jury could infer a dedication: "The user of the line of deviation over the adjoining land by reason of a wilful obstruction is no more the user of a deviation over adjoining land by reason of the highway being foundrous. I know of no decision and no principle making a distinction between a road impassable by non-feasance—that is, neglect to repair—and a road impassable by misfeasance—that is, by a ditch and bank wilfully made."

Byles, J.: "It is clear there can be no dedication of a way to the public for a limited time, certain or uncertain. If dedicated at all it must be dedicated in perpetuity. It is also an established maxim, once a highway always a highway, for the public cannot release their rights, and there is no extinctive presumption or prescription * * It was plain the public had never used the deviating track, except when they were shut out from the true ancient highway. The public user therefore was referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway."

I have quoted from this judgment to illustrate the marked distinction between the case before us and the common case in this country, already noticed, of a line deviating from, or used close to, or adjoining as near as practicable, a road allowance unopened or impassable.

I am clearly of opinion that the road stopped by this by-law was in every sense a public highway.

The question remains as to the right to stop the highway.

The Act of 1849, 12 Vic. ch. 81, sec. 31, sub-sec. 10, gave power to open, &c., any new or existing highway, road, &c.

Sec. 187 absolutely forbade the stopping up of any original allowance for road.

20 Vic. ch. 69, (1867) sec. 2, allows the municipality to stop up and sell the original allowance, and sec. 7 introduces, as I believe for the first time, the provision that it should not be lawful to close up "any public road or highway, whether such road or highway be an original road allowance or a road which has been opened by Quarter Sessions, County or Township Councils, through any land by which any person shall be excluded from ingress or egress to and from a place of residence over the said road; but all such roads shall remain open for the use of the person who shall require the same."

In the Consol. Statute of 1859, ch. 54, sec. 318, and in the Consol. Act of 1866, ch. 51, sec. 320, the clause, slightly altered, reads thus: "No Council shall close up any public road or highway, whether an original allowance or a road opened by the Quarter Sessions, or any Municipal Council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his land or place of residence over such road, but all such roads shall remain open for the use of the person who requires the same."

We are called on to place a construction on this clause, as far as I know, for the first time.

The power to stop up a road was before the Court in *Johnston v. Reesor* (10 U. C. 101). This was prior to the passing the Act as to egress and ingress. Sir J. B. Robinson says: "Here was a road first allowed at an early period as a mere accommodation to the immediate neighbours, for enabling them to pass through private property, by a short road, from one concession to another, instead of going round by the nearest public allowance when the ground might have been wet or unfavorable. It may be very reasonable afterwards, when the township becomes cleared and populous, and roads can be made more easily, to relieve the proprietor of the land from the disadvantage of having the thoroughfare through his property, and to have only the public allowance."

It would seem that the municipality then had unlimited powers to stop all highways not being original allowances. Then the Act of 1857 extended their power over original allowances, and added the restrictive clause as to ingress and egress, applicable to all roads legally established. Are we to construe this clause as applicable only to cases where, by shutting up a road, ingress and egress would be totally barred? This would confine the restriction to cases chiefly where the road to be stopped was what is commonly called a *cul-de-sac*.

Under the usual system of laying out roads in this country there are not many cases where a person would be excluded from ingress and egress to and from his land by the stopping of any one road. He would generally have an approach by going round by another road. Small holdings could of course exist along a road cut across lots from one concession line to the other, where the stopping up of such road might effectually cut off the owners of such holdings.

In the case before us it does not appear that by the stoppage of this road any persons will be completely cut off from ingress and egress, but the affidavits shew that a very serious inconvenience and injury must be done to them by forcing them to make a circuit of nearly a mile longer to reach the village of Acton and the railway station.

We can see no shadow of justice in the course taken by the council. Mr. Cummings has no right to complain. He bought his land from the man who had already expressly dedicated a portion to the public, and the road was there, visible to all. If councils have power to shut up such a road as this road, the general result may be most serious. A person desirous of selling off a portion of his land in small building lots, or of having a short access from a valuable mill to a railway station, might pay a large sum of money to an intervening proprietor to open a public road across his lot. After this had been done, and the road established as a legal highway, the council might

interpose and shut it up, telling the sufferer that he might still enjoy ingress and egress to his property to mill or market, by going one, two, or three miles round.

In view of this possible injustice, I desire to construe the clause as strictly as I can against the power of the council.

The Legislature says, in effect, "You must not stop any road whereby any person will be excluded from ingress and egress to and from his lands or place of residence *over such road*." If, then, such a road be stopped, most certainly all persons must be excluded from ingress and egress to or from their lands *over that road*. There can be no ingress or egress over a stopped up road. Therefore, I presume all persons who came into their lands directly from that road, or passed from their lands directly on to that road, are to be protected. This would leave all persons who merely used the road as a convenience, but had no lands abutting thereon from or to which ingress or egress would be affected, without the protection of the clause.

The stopped road extended westward to the north-east angle of the Moore's lot, and the south-east angle of Lachlan McMillan's lot. According to the plan before us, either of these proprietors could pass directly from this corner of his lot to the road. In this way are they not within the letter of the protection? They undoubtedly have ingress and egress to and from their lots without this road, but they also had it *over this road*. It may be mathematically inexact to speak of substantial ingress and egress between two figures whose only point of contact is at the apex of a right angle of each.* Practically, we know that, in a case like this, there may be such passage, especially as McCoy gave two rods off his lot, which would leave the road one rod at least north of the north line of the road given by Bedford and Walker.

The law undoubtedly needs amendment, as any construction of this clause may produce most unlooked for results. If this construction of the clause be correct, the

by-law cannot be supported, at all events as against the rights of the parties referred to.

Therefore, as far as the municipality was concerned, there was no just ground whatever for closing this road, laid out as it was and dedicated to the public by the owners of the land. It seems to have been passed solely to serve the interests of Mr. Cummings. It is not necessary for us to discuss the possible distinction between the rights of individuals whose ingress and egress may be affected and that of the general public: it is enough to decide that this by-law, in its present shape at least, cannot be supported.

The council evidently acted under a mistaken idea as to Mr. Cummings's rights. Even if we did not feel ourselves at liberty to quash the by-law, I will give the council the credit of assuming that they would gladly repeal it on being pointed to the absolute injustice done by its enactment.

GWYNNE, J.—The persons who originally, in 1836, gave land off their respective lots for the purpose of the road in question, and dedicated it to the public, did so, in my opinion, not merely for a dedication to public uses but for the special and peculiar accommodation and benefit of themselves and the owners, for the time being, of the respective lots; and if no public labor or money had ever been laid out upon the road, I am of opinion that each proprietor of the lots 31 and 32, after more than twenty years user of such road, would have acquired the right and easement of insisting, as against each other, upon the road being kept and maintained open, and the municipality in such a case would have had no control over the road or power to close it to the prejudice of any of the parties who had dedicated it for their own special benefit.

For the purpose of the Municipal Institutions Act, that is, for the purpose of bringing the road within the character and description of a common and public highway, it was necessary that statute labor should be usually per-

formed upon it within the 315th section of 29 & 30 Vic., ch. 51, or that a by-law of the municipality should be passed assuming the road within the 339th section. Now in this case no by-law has been passed assuming the road, but statute labor sufficiently appears to have been usually performed upon it. Whether or not, under these circumstances, the municipality is liable to keep the road in repair, notwithstanding the 339th section, is a question we are not called upon to consider. The question we have to consider is merely whether the by-law passed for the purpose of stopping it up is valid. If the parties who originally laid out the road have, as I think they have, a peculiar interest in maintaining it open for the special accommodation of the owners of the lots through which the road is laid down, whether it had been assumed by the municipality or not, the municipality could not, in my opinion, even if they had assumed the road by by-law, afterwards shut it up by by-law to the prejudice of those peculiar rights of the owners of the lots who originally dedicated the road. In so far as the general public might have a right to the road, the municipality may perhaps be able by by-law to divest those rights; but I do not see how, even independently of sec. 320 of the Act, a by-law of the municipality could divest parties of peculiar private rights which they had acquired *inter se* by contract or conduct and prescription. The 320th section, as it appears to me, but expresses what would be law in the circumstances of this case without that section. Upon the facts of this case, I am of opinion that the municipality, in passing the by-law in question, have exceeded their jurisdiction.

GALT, J., concurred.

Rule absolute.

GRAY V. BILLINGTON.

Patent invention—Agreement to pay assignee for right of manufacture—Invention not new—Pleading.

Declaration, that defendant by deed covenanted with plaintiff to manufacture, within a year, at least 100 machines, and to pay to plaintiff every three months, during the first nine months of said year, \$2 for every machine made and sold; and at the end of the year to pay \$2 for every machine made and not sold during the first nine months of said year: *averment*, that all things, &c., and defendant had made 200 machines, but had not paid, &c.

Plea, that by said deed it was recited that Letters Patent had been granted to A. for a "new and useful, &c.," being the machine mentioned, of which A. claimed to be inventor; and by said deed it was recited that plaintiff was assignee of said Letters Patent, and the rights conferred, and plaintiff, as such assignee, contracted with defendant for the sale of the exclusive right of making, &c., said invention in, &c., &c.; that by said deed plaintiff pretended to grant and assign to defendant said rights so contracted for, &c.: *averment*, that after making said deed defendant discovered that invention not new:

Held, on demurrer, plea bad.

Declaration, that defendant, by deed dated the 15th September, 1869, and made between plaintiff, of first part, and defendant, of second part, covenanted with plaintiff, among other things, "that he will, if the contingencies as to death or fire, hereinafter mentioned, do not arise, *manufacture and make*, within the year aforesaid, at least 100 machines after the pattern of said invention, and will, at expiration of every three months during said first nine months of the year aforesaid, pay said party of first part \$2 for every machine manufactured and sold under these presents during the respective periods immediately preceding each respective term of three months, and at expiration of said year pay said party of first part (meaning plaintiff) \$2 *for every machine manufactured* under these presents and not sold during first nine months of said year;" *averment*, that plaintiff had performed all things on his part and all things had happened to entitle him to recover, and although the contingencies as to death or fire, in said covenant mentioned, had not occurred, and although said defendant had manufactured a number of machines under said covenant, and after the pattern of the invention

in said deed mentioned, to wit, the number of 200, yet said defendant had not paid said plaintiff said \$2 for every machine manufactured and sold by defendant within the first nine months of said year in said covenant mentioned, nor had said defendant paid said plaintiff said \$2 for every machine manufactured within the year in said covenant mentioned.

Plea, that by said deed it was recited and set forth that Her Majesty the Queen had by certain Letters Patent, dated March, 1865, given and granted unto one Alexander Anderson, his heirs, lawful representatives, and assigns, the full and exclusive privilege of making, constructing, using and vending to others an original invention called "A New and Useful Anderson's Even-balanced Vibrating Cultivator," being the invention in the said first count mentioned, of which said Anderson claimed to be the original discoverer, for the term of fourteen years from the date of the said Letters Patent, with a prohibition to all persons whomsoever other than said Anderson, his agents and assigns, to use and vend said invention; and by said deed it was also recited that plaintiff was the assignee of said Anderson of said Letters Patent and the right and privilege thereby conferred, and that plaintiff as such assignee had contracted with defendant for the sale to defendant of the exclusive right of making, using, and constructing said invention in the Town of Dundas, and not elsewhere, during the period of one year and no longer, and an exclusive right of vending and using at any time thereafter, within the County of Halton, all machines from said invention so made and constructed at the said Town of Dundas within said year; and by said deed plaintiff pretended to grant and assign to defendant said rights so contracted for, and defendant in consideration thereof covenanted with plaintiff as in said first count mentioned; *averment*, that since making of said deed defendant had discovered, and the fact was, that said supposed invention was not at the time of the petition in the said Letters Patent mentioned, or of the granting of said Letters Patent

a new invention as to the public use or exercise thereof within the said Province of Canada, contrary to the form and effect of the said Letters Patent and of the Statute in such case made and provided, whereby said Letters Patent were invalid, void and of none effect, and no benefit or advantage was ever derived from said assignment of said Letters Patent for the places mentioned in this plea.

Demurrer, that it was not necessary that the Patent should have been new, or said Alexander Anderson the the first inventor, to make said contract declared on binding on defendant.

F. Osler supported the demurrer.

Robertson, *contra*, was not called upon by the Court.

The following cases were referred to: *Tabor v. Edwards* 4 C. B. N. S. 1; *Hall v. Conder*, 2 C. B. N. S. 22, S. C. 3 Jur. N. S. 963; *Lawes v. Purser*, 6 E. & B. 930; *Hayne v. Maltby*, 3 T. R. 438; *Cutler v. Bower*, 11 Q. B. 973; *Chanter v. Dewhurst*, 12 M. & W. 823.

HAGARTY, C. J.—We see no necessity for holding the case over for further consideration, as we are all of opinion, under the authorities, that the plea is bad. The law is clear on the two cases of *Lawes v. Purser*, and *Hall v. Conder*.

The judgment will therefore be for the plaintiff, on demurrer.

Judgment accordingly.

RICHARDSON V. THE HOME INSURANCE COMPANY.

Marine Insurance—Mortgagee of vessel alone named in policy—Right to recover for mortgagor's interest.

Held, that a mortgagee of a vessel, who was alone named in a policy as the assured, without any general words, or other indication of interest in any other person, but who had, in fact, insured the mortgagor's interest also, as disclosed to the insurers at the time, could recover the whole amount so insured on parol evidence of that fact.

Action on a marine policy on one-half of the barque "Waterwitch"; that plaintiff caused insurance to be made for benefit of himself, as mortgagee, and of one Samuel Fraser, as owner of equity of redemption, with the consent of Fraser, for whom he was trustee in the matter of the insurance, to the extent of Fraser's interest therein; and that plaintiff and Fraser were, or one of them was, interested until and at the time of loss, together, to amount of all the moneys insured thereon; (after averment of loss), that plaintiff, as well for himself as for said Fraser, and as trustee for him, &c.

Pleas, traversing the contract, and plaintiff's and Fraser's interest, as alleged, with other pleas, on which nothing turned.

At the trial, before Galt, J., at Picton, it was proved that one Samuel Fraser, who was the owner of the "Waterwitch," executed a mortgage on the 11th January, 1868, on the said vessel, to one James Swift, securing \$1,500.

James Swift proved that he assigned this mortgage to the plaintiff, the assignment being dated 31st March, 1868, and as collateral security for a note of \$2,400. This witness was agent for defendants at Kingston, and stated: "At the time of the effecting the policy I knew that it was to cover Fraser's interest as well as Richardson's. I do not grant policies; I merely receive applications and forward them, and the office at Buffalo send such policies as they approve of. I made no particular report to the office."

Samuel Fraser: "Mr. Richardson insured the vessel for

\$3,000: it was understood between him and me that he was to insure the vessel as trustee for me." It was objected that under the terms of the policy Mr. Richardson could insure only his own interest. "I signed the affidavit produced, marked exhibit 3, and swore to it: I do not know whether I instructed Richardson to insure in his own name for my benefit: I wanted him to have my interest insured: I did not care in whose name the policy was."

The policy was produced. By it the Home Insurance Company, on account of James Richardson, made insurance, and caused \$3,000 to be insured on half of the body of the barque "Waterwitch," from 1st April to 30th November, 1869. The vessel was valued at \$8,000.

No other person was mentioned in the policy, nor was there any indication of any other interest than that of plaintiff.

On the objection as to plaintiff's right to recover, beyond his own interest as mortgagee, leave was reserved to move to reduce the verdict to \$1,500, and interest, being the amount of his mortgage; and plaintiff had a verdict for the full amount.

In Michaelmas Term *Anderson* obtained a rule on the leave reserved, to which *Britton* and *Machar* shewed cause, citing *Crawford v. St. Lawrence Insurance Co.*, 8 U. C. 135; *Carruthers v. Sheddon*, 6 Taunt. 14.

[HAGARTY, C. J., referred to *McCollum v. Aetna Insurance Co.*, 20 C. P. 289.]

Anderson, contra.

HAGARTY, C. J., delivered the judgment of the Court.

Had this policy contained the words usually to be found in English marine policies, "for the benefit of all concerned," or any words to the effect that it was as agent or trustee for others, it seems that parol evidence can be given to shew for whom the insurance was really effected.

Our recent decision, in *McCollum v. Aetna Insurance Co.*, (20 C. P. 289), does not necessarily decide this question.

The point before us is not whether a person not named as interested in the vessel or cargo insured, and with whom, by name, the contract is not made, can sue, but whether a party solely named as the assured, without any general words, or other indication of interest in any other person on the face of the policy, can recover more than his actual interest, on proof outside the writing that he did insure to protect the interest of another.

In *Irving v. Richardson* (2 B. & Adol. 193, 1 M. & Rob. 153) the assured was mortgagee. Littledale, J., says: "Before the late Registry Act, the mortgagee of a ship was, in point of law, the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself. By the Statute the interests of mortgagor and mortgagee are more distinctly secured than they formerly were. The mortgagor does not now cease to be an owner. * * * It was rightly put to the jury whether, in effecting the policies, he intended to insure the whole interest in the vessel, or merely the amount of his own as mortgagee." Lord Tenterden had so left it to the jury, and concurred in this view. This case does not state the form of the policy.

Marshall on Insurance, 5th ed.: "The mortgagee is entitled to recover to the extent only of his mortgage debt, unless (which is a question for the jury) his intention was to insure not only that interest, but the interest of mortgagor, in the surplus value, which in that case he may receive and hold as trustee for mortgagor.

1 Arnould, 252: "The question then as to the amount recoverable, under an *open* policy, effected by a mortgagee, will in all cases depend upon the intention, in point of fact, of the mortgagee in effecting the policy. If he intended to cover the whole interest, both legal and equitable, he may then recover the whole amount of the insurance, under trust as to the surplus, to hold it for the mortgagor.

The statement in the judgment, in *Irving v. Richardson*, that before the Ship Registry Acts "the mortgagee was in point of law the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself,"

is very suggestive. We are not told what form of policy there was, and in the great mass of cases on the subject of insurance it is very rarely stated, as the policies are generally in one well known form, with general words. Now we may gather from the language used in this last case, that since the Registry Acts, the interests being more sharply defined, it may be ascertained by extrinsic evidence whether the mortgagee, effecting an insurance, intended to insure the whole interest, or merely his interest as mortgagee.

It seems that the cases cited in the judgment, *McCollum v. Ætna Insurance Co.*, as to the effect of general words for the benefit of all concerned, and such like, are merely to enable parties interested, and for whose benefit it was in fact made, although not named in the instrument, to sue thereon. Here the question is much narrower; the mortgagee is alone named. Can he be allowed to prove that he also intended to protect his mortgagor's interest?

In the very elaborate judgment of the late Sir J. Macaulay, in *Ogden v. Mutual Assurance Co.*, the point is frequently referred to, but not distinctly decided. I rather gather from it that it was that very learned Judge's opinion that evidence could be given of the intention to secure the interest of the mortgagor as well as that of mortgagee, in whose name alone the policy had been issued, if there had been a proper averment in the declaration of such intention, and of the mortgagor's interest, all which are here properly averred. It is not easy to see why it should not be allowed in a case like this. It may be said that it is admitting parol evidence to explain or expand the written contract. To this it may be readily answered that such evidence always is resorted to in the vast majority of English marine policies, where the insurance broker's name alone appears. A mortgagee, in possession, could always insure to the full value of the goods.

In *Waters v. Monarch Assurance Co.*, (5 E. & B. 870) the assured were warehousemen and merchants, and insured certain goods as held in trust. As far as the policy is set out in

the case, it seems that no other name is mentioned, nor any general words used; nor beyond the expression, "goods in trust or on commission," is there any intimation of any other persons having any interest. There was a condition that the policy should not cover goods held *on trust* unless the same be expressly inserted in the policy. The contest was, whether plaintiffs had an insurable interest, and if so, to what extent could they recover. The Court decided that they had the right to recover the whole value. The argument of Mr. Mellish (now Lord Justice) is very instructive, and the Court consider the case very clear. Lord Campbell says: "The last point that arises is, to what extent does the policy protect these goods? The defendants say it was only the plaintiff's personal interest, But the policies are in terms to make good "all such damage and loss as may happen, by fire, to the property. That is a valid contract, and as the property is wholly destroyed the value of the whole must be made good, not merely the particular interest of the plaintiff's. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest." Wightman, J., says: "Then comes the question, can the plaintiff's recover their value? It seems to me they may, unless there be something making it illegal to insure more than the plaintiffs' own interest. Mr. Lush does not contend that any Statute applies. It has been decided that if no Statute applies, a person insured may recover the amount contracted for."

London and North-western Railway v. Glyn (1 El. & El. 652) is to the same effect, except that plaintiffs were carriers instead of warehousemen. Crompton, J., says: "*Waters v. Monarch Assurance Company*, established that persons who, like the plaintiffs here, are the bailees of goods, have an insurable interest in them, as against the assurers, to their full value, although the assured may be trustees for third persons of part of the amount recovered on the policy. * * I think, too, that this condition (as to stating if goods held in trust) means the value of such property shall not be

recoverable unless you specify it as trust property; but if you do, its entire value shall be recoverable. I think, too, that notwithstanding this condition, an insurance simply upon "goods" would have covered the plaintiffs' interest as carriers in the goods. * * There is no hardship in holding the insurance offices liable to the full value of the goods, for they have received the premium upon the full value." Hill, J.: "I agree with my brother Crompton, that this condition would not have prevented the plaintiffs from recovering on the policy to the extent of their interest as carriers, *had they intended to insure only that interest, and with that intention had made the insurance* simply upon 'goods,' without adding the words 'in trust.'" In *Crowley v. Cohen* (3 B. & Ad. 478) the policy was in favor of plaintiffs, who were carriers by water on their canal boats, and goods therein, "as interest may appear hereafter." Nothing is said as to the goods being "in trust," or held as carriers. It was held that they could recover the full value of the goods. Lord Tenderden says, "I agree in the proposition that, although the subject matter of the insurance must be properly described, the value of the interest may in general be left at large." Park, J.: "The particular nature of the interest is a matter which only bears on the amount of the damages, it is never specially set out in a policy."

Carruthers v. Sheddon (6 Taunt. 14) may be also referred to.

The Statute of 1787, 28 Geo. III. ch. 56, directs that there must be the name or names of one or more of the persons interested, *or* of consignor or consignee of the property, or of the persons resident in Great Britain, who shall receive the order and effect the policy, *or* of the persons who shall give the order to the agent immediately employed to effect it.

There is a collection of cases in the American editor's notes to 1 Arnould, 169-70. I have examined most of them. It appears very clearly that without some general words, or such words "as agent," only the interest of the

person named is insured. This point, and the authorities, are noticed in *McCullum v. Aetna Insurance Co.* I think, therefore, that the whole must turn on the particular position of the plaintiff here as mortgagee. If a mortgagee in possession, there seems no doubt that he can insure the whole value. It is already shewn that parties, such as warehousemen, carriers, &c., may also insure to full value, and I think the cases cited shew that, except to comply with a condition to that effect in the policy, they need not state that they hold in trust; but it may become an important question to ascertain, by external evidence, whether they intended to cover merely their special interest as bailees, or the entire value of the goods, in which latter case they would be trustees of the surplus for the bailors or owners.

Abbott on Shipping, 11th ed. 33, says: "Since this enactment (Ship Registry) it has been doubted whether a mortgagee of a ship can insure for the full value of it," citing *Irving v. Richardson*. It then refers to some cases bearing upon the relations of mortgagor and mortgagee under the Statutes.

In *Dean v. McGhie* (4 Bing. 49), Best, C. J., says: "The object of the Statute (6 Geo. IV. ch. 110) was to confer a benefit on mortgagees, by exempting them from charges and responsibilities to which they were before liable. It does not, however, prevent them from becoming legal owners, or apply to cases in which the mortgagee has reduced the ship into possession. See also *Kersewill v. Bishop* (2 C. & J. 529); *Branker v. Molyneux* (5 Jur. 773).

In *Smith v. Lascelles* (2 T. R. 188) Ashurst, J., says: "The plaintiff had only mortgaged his interest in the goods and freight to defendant, and therefore, although the defendant may have insured the *legal* interest on his own account, he might also have insured the *equitable* interest remaining in plaintiff on plaintiff's account." Turning again to *Irving v. Richardson*, the mortgagee seems to have recovered £2,000 on a ship valued at £3,000. It appeared his mortgage was only for £900, and the action

was brought to recover back the difference. Lord Tenterden left to the jury to say, whether the insurance effected by him was intended to cover his interest only as mortgagee, or that of mortgagor also. The jury found that he only meant to insure his own interest as mortgagee, and plaintiff had a verdict. Then, in Term, we find that very able Judge, Littledale, holding that mortgagee, before the Registry Act, was, in point of law, the owner, and might insure to the full extent of the value to mortgagor as to himself; then, since the Statute, as mortgagor did not cease to be owner, it was necessary to ascertain what it was that mortgagee in reality insured, that he might not keep possession of a sum exceeding his interest, Park, J., and Lord Tenterden concurring.

It appears to me, after much consideration, that if the mortgagee, before the Registry Acts, could recover the full value of the ship insured on a policy simply to himself, without general words, that there is nothing in the Statutes to alter such a right, but that it becomes highly important to ascertain whether he intended to protect mortgagor's interest as well as his own. It may be suggested that he could only thus recover on a policy with general words, or something on the face of it to indicate that there was another interest to protect. I do not think the law rested on that. He was the legal owner of all, all being assigned to him, and all was insurable as his own. The ship is still wholly made over to him, subject to redemption. He can take possession on default, and then could, undoubtedly, insure to full value. This reduces the objection to the point that, not being in possession, and the Statute declaring that the mortgagor does not cease to be owner, a different rule prevails. I have already cited cases as to the effect of the statute. I do not think it has altered the legal status of the assignee of a ship by way of mortgage, so far as the right to insure to the full value is concerned. I have found no direct authority on this last point, and I do not feel warranted in deciding against the validity of an insurance made in good faith, expressly declared to the

agent for the underwriters as being for the benefit of mortgagor as well as mortgagee, and on which, with full knowledge, the full premium was accepted.

GWYNNE, J.—When the action of *Irving v. Richardson* (1 Mood. & Rob. 153) was brought, there appears to have been no doubt entertained that a mortgagee of a ship, who had effected a policy on the ship, wherein it was valued at an amount much in excess of the mortgage debt, could, upon a total loss, recover the whole amount of the valuation stated in the policy. Richardson, who held a mortgage for £900 only, had insured £1,700 on the ship valued at £3,000, and afterwards insured £2,000 on the same ship, valued again at £3,000, with the Alliance Company. The ship was lost, and Richardson, after receiving the £1,700 from the first insurance, received the £2,000 also from the Alliance. The action was brought by the plaintiff, the Chairman of the latter Company, entitled to sue by Act of Parliament, on behalf of the Company, to recover, not the difference between Richardson's mortgage and the amount he had received, but the Alliance Company's proportion only of the £700, paid in excess of the amount of the value of the ship, stated in the policies. At the trial it was contended, on behalf of the defendants, that the case was governed by *Bousfield v. Barnes* (4 Camp. 238), and that upon the authority of that case the defendant was entitled to retain the £700. Now, in that case, Bousfield sued Barnes, as underwriter, to the amount of £600, insured upon a ship which, by the policy, was valued at £6,000. The defence was that Bousfield had effected another insurance, with the London Assurance Company, for £6,000, on the same ship, valued at £8,000, which had been paid in full; and the contention was, that Bousfield, having so received the full amount of the *value* stated in the policy upon which he was suing Barnes, could not recover. But Lord Ellenborough held that the one policy could not be referred to in this manner, which was a *res inter alios acta*, to defeat the plaintiff's action on the other; that the

object of the valuation, in each case, was to limit the amount to which the underwriters, in each case, were liable; and it being proved that, in fact, the subject matter insured was worth £8,000, the plaintiff was entitled to recover upon both policies. In *Irving v. Richardson*, it was shewn that the vessel insured was really worth more than £3,700, and it was contended that the mortgagee had a right, for the benefit of the mortgagor, to insure the full value of the vessel, and that therefore the plaintiff could not recover. Lord Tenterden, C. J., left the question to the jury upon the fact, whether the insurance effected by the defendant was intended to cover the defendant's own interest only, as mortgagee, or that of the mortgagor also. Upon the jury rendering their verdict that the defendant had only insured his own interest as mortgagee, Lord Tenterden said: "I was prepared to give my opinion in point of law, if it had been necessary, that this case is not governed by that cited. There the sum mentioned as the value was different in the two insurances; here it was the same. I am of opinion that when a person effects two insurances, declaring the same value in each, he is bound by that sum, and cannot receive beyond that extent."

Now, if it was supposed that, in fact, the mortgagee had no right to recover beyond the amount of his mortgage debt, which was only £900, it is strange not only that the action was not brought to recover back the excess paid beyond that amount, but that Lord Tenterden should have limited his observations to the mortgagees right to recover no more than the valuation named in the policy. It seems as if it was regarded as not open to the insurer to question *the amount* of the insured's interest, to the extent of the valuation named in the policy, the policy being a valued one, upon the principle of *Shawe v. Felton* (2 East. 109). In the following Term Campbell moved for a new trial, on the ground of misdirection. He contended, on the authority of *Smith v. Lascelles* (2 T. R. 187), that the defendant, as mortgagee, had a right to insure the whole value of the ship on his own account, as legal owner, and that having

insured to the extent of that value, he would be entitled to recover against two sets of underwriters, notwithstanding the objection taken by plaintiff; and he contended that the mortgagee, having so insured, it ought not to have been left to the jury, as a question, whether he did so on his own account or on that of the mortgagor. The Court refused the rule, Littledale, J., saying, that "by the Ship Registry Act the mortgagor does not cease to be owner. In order, therefore, that the defendant in this case might not keep possession of a sum *exceeding not only* the value stated in the policies, *but also the amount of his interest*, it became necessary to ascertain what he had in reality insured, and with this view it was rightly put to the jury whether, in effecting the policies, he intended to insure *the whole interest in the vessel*, or merely the amount of his own interest as mortgagee."

Parke, J., says: "The mortgagee of a ship, at least since the Statute, has a distinct interest from that of the mortgagor, to the extent, *prima facie*, of the value mortgaged: the case, therefore, was rightly left to the jury." And Patteson, J., says: "The defendant, if he had been suing on one of these policies, in respect of his interest as mortgagee, must have averred that he was interested to the amount insured, and could not have recovered *the sum here in dispute, if it had been an excess above the value mortgaged*: it was, therefore, a proper question for the jury in this case, whether he intended to insure that amount only, or the value of the ship, to both the parties interested."

The principle to be gathered from this case, Mr. Arnould has embodied in his work on Insurance (Vol. I. 2nd ed. p. 306), thus: "Although the ownership of the mortgagee is distinguished in the register from the absolute ownership, yet the mortgagee of a ship may still protect his interest therein by a general policy on the ship in the common form; *and in such policy he may insure to the full value of the ship, but can only recover to the extent of his mortgage debt*, unless it appears that in effecting the policy, he intended to cover not his own interest only, as

mortgagee, but that of the mortgagor also." And he adds : "The question then, as to the amount recoverable under an *open* policy effected by a mortgagee, will in all cases depend upon the intention, in point of fact, of the mortgagee in effecting the policy. If he intended it to cover the whole amount, both legal and equitable, he may then recover the whole amount of the insurance, under a trust as to the surplus to hold it for the mortgagor; if he intended it to cover only his own interest as mortgagee, and the amount of the insurance is greater than that of the mortgage debt, he can recover to the extent only of his lien." In *Sparkes v. Marshall* (2 Bing. N. C. 761) *Irving v. Richardson* is cited by Maule, *arguendo*, as settling that since the Ship Registry Act, in the case of an insurance upon a ship effected by a mortgagee, (without making any distinction between a valued and an open policy,) inasmuch as he is owner only to the extent of the value mortgaged, it is a proper question to submit to a jury whether, in effecting the insurance, he meant to insure his own interest only, or that of the mortgagor also.

In *Lewis v. Rucker* (2 Burr. 1171), in an action on a valued policy, on goods damaged at sea, Lord Mansfield says: "If it should come out in proof that a man had insured £2,000, and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination that by such an evasion the Act of Parliament may be defeated; the effect of the valuation is only fixing conclusively the precise cost: if it be an open policy, the prime cost must be proved: in a valued policy it is agreed." Now, if in an action by a mortgagee, upon a valued policy, the valuation stated in the policy should appear to be much in excess of, as here, double the amount of the mortgage debt, I apprehend the same rule would have to be applied as in the case of an open policy; although, perhaps, the fact of the valuation being so much in excess of the mortgagee's interest, may, in the absence of fraud, afford evidence of his intention to insure also on behalf of the mortgagor. In the case before us, the policy

in fact appears to be a valued policy, although the valuation agreed upon is not stated in the declaration. The declaration states, however, that the insurance was in fact effected as well on behalf of the mortgagor as of the mortgagee. The evidence establishes this fact, and that the mortgagee so effected the insurance, at the request and by the direction of the mortgagor; and that the insurers were made aware of the fact, and that they executed the policy, intending to cover thereby the interest of the mortgagor as well as that of the mortgagee. If, as I understand the decision in *Irving v. Richardson*, the *intention* of the mortgagee, without the request of the mortgagor and without its being disclosed to the insurers, will be sufficient to enable the mortgagee to recover, as well on behalf of the mortgagor as of himself; *a fortiori*, shall the mortgagee recover the full amount, when his intention to cover the mortgagor's interest arises at the request of the mortgagor, and is communicated to the insurers at the time the policy is effected. In such a case, as it appears to me, the policy is effected with the mortgagee beneficially, in respect of his own interest, and with him as agent of, or trustee for, the mortgagor, in respect of the latter's interest, and upon the authority of *Carruthers v. Sheddon* (6 Taunt. 14), these separate interests need not be disclosed in the policy. The case of *McCollum v. Aetna Insurance Co.*, has no application to this case. There we decided that a person not appearing by the policy to have any interest in the subject matter of the insurance, and the policy not being alleged to be made on account of whom it may concern, but on account only of a particular person named, could not sue on the policy in his own name, averring an interest in himself, and that the policy was, contrary to what appeared on its face, effected on his behalf. The plaintiff is, in my opinion, entitled to hold his verdict to the full amount.

GALT, J., concurred.

Rule discharged.

JOHNSTON AND WIFE AND LEWIS v. McLELLAN.

Married Woman's Act — Demise of wife's freehold by husband and wife without separate examination.

Held, that the receipt of rent by the wife, with the husband's assent, from a tenant of her estate, after the expiration of a term, creates a tenancy from year to year.

EJECTMENT for a lot of land in the Town of Cornwall.

Plaintiffs claimed as follows: Lewis, by a demise from his co-plaintiffs, and the latter by a release from Henry Stafford and wife of a moiety, and the other moiety under the will of Alexander Forsyth.

Defendant, admitting plaintiff's title, claimed title as assignee in insolvency of Angus McDonell and Angus McPhaul, who were tenants of plaintiffs, Johnston and wife and the other devisees of A. Forsyth, on an unexpired tenancy.

The trial took place at Cornwall, before Hagarty, C. J.

The following facts were admitted: That plaintiffs had *prima facie* title, (and defendant began): that Alexander Forsyth, deceased, had been owner: that two of his executors made the lease produced to Angus McDonell, on 10th April, 1857; *habendum* from 4th August, 1853, for eleven years; rent payable quarterly. This lease expired 4th August, 1864. Before its expiration lessee became partner of McPhaul, and continued paying rent after its expiration.

It was further admitted that defendant was assignee of Mr. McDonell and Mr. McPhaul: that the insolvency was in 1867, and the assignee elected to take the lease: that rent had been regularly paid up to the 4th August, 1870: that on the devisees, under Forsyth's will, coming of age, which was about 1st May, 1869, the right of the executors ceased. The female plaintiff was one of the devisees, and she married in 1866 or 1867. It was also admitted that the rent had been regularly paid to her, with her husband's assent, to 4th August, 1870: that no issue had been born of the marriage. Demand of possession was proved.

For the plaintiff it was contended that the yearly tenancy claimed by defendants as existing since the termination of the eleven years' lease, could not prevail against Mrs. Johnston; that the payments of rent to her could not bind her interest; and that under the Married Woman's Act especially she could not be affected.

There was a verdict for plaintiff, and leave reserved to defendant to move to enter a nonsuit.

In Michaelmas Term, *Scott* obtained a rule on the leave reserved, to which *Bethune* shewed cause, citing *Emrick v. Sullivan*, 25 U. C. 105; C. S. U. C. ch. 73, s. 1; *Woodf. L. & T.* 7 ed. 42.

Scott, contra, cited *Wright v. Garden*, 28 U. C. 609.

HAGARTY, C. J., delivered the judgment of the Court.

The lease expired in 1864. From that time till May, 1869, it is conceded that a tenancy from year to year was created by receipt of rent, &c. When the female plaintiff became owner of the land, with her co-owners (according to the admission), viz., in May, 1869, she was under coverture, but she continued receiving the rent, with her husband's consent, as it was received under the lease.

It is said in *Woodfall*, L. & T. 46 (ed. 1867), "A lease by husband and wife, without deed, is void as against the surviving wife, for it cannot be said to be her lease, but it will be good during the coverture, if the lease continues so long"; citing *Bateman v. Allen*, Cro. Eliz. 438; 2 Co. R. 616. "Although it is without deed, it is well enough, leastwise during the life of the baron, and it is a lease from them both during that time." It is added, in *Woodfall*, that the term must not exceed three years, under the Statute of Frauds.

Apart from the Married Woman's Act, I see no reason to question that a tenancy from year to year, on the wife's lands, can be set up by the usual evidence of payment and receipt of rent, as in this case. The husband's interest, during their joint lives, in the wife's land, would support

such a tenancy, I presume, by his sole receipt of rent. It is urged that the last mentioned Act would make a difference. In discussing this Act, Draper, C. J., in *Emrick and Wife v. Sullivan* (25 U. C. 107), speaking of tenancy by courtesy, says: "The 13th section of the Act appears to us to recognize that by virtue of the marriage the husband acquired other estates or interests in the wife's real estate, for otherwise the provision that such estate or interest should not be subject to his debts, would be useless. During the wife's life, his estate or interest as tenant, by the courtesy, would not be consummate, and could not be made so subject, and therefore we apprehend the Statute must refer to the estate he has, as being jointly seised with his wife and in her right, during the coverture, of her real estate; and then he is a necessary party to the conveyance of such estate; and at common law the husband alone could lease for a term." Were we even to assume that this Act affected or lessened any interest or estate of the husband, it would be, on the principle of the Statute, increasing instead of lessening the wife's right to deal with her estate (as has been urged) as if she were a *feme sole* without her husband's assent, as *e. g.*, under sec. 4: "No conveyance or other act of a wife, in respect of her real estate, shall deprive her husband of any estate he may become entitled to as tenant by the courtesy."

It would be a singular result if, under an Act framed so stringently, to enable a woman to hold her real estate "in as full and ample a manner as if she continued sole and unmarried," her receipt of the rents of her now land, with her husband's assent, should have a less effect than under the common law. Of course the remark is obvious, that under the old law, the husband's demise alone was good during the joint lives, and that under the new law her separate rights to her real estate must prevail. If she is to be treated as if still *feme sole*, her independent action in receipt of rent should have its effect.

If we take the law (as we do) from the decision in *Emrick v. Sullivan*, the husband still retains the estate in

joint seisin with the wife, as before the Act. Then, we see no reason why the joint receipt of rent, after the termination of a lease for years, may not, at least, suffice to set up a yearly tenancy, only terminable in the usual manner. Speaking for myself, I am most reluctant further to extend the provisions of the Married Woman's Act, beyond the decided cases.

In *Kræmer v. Gless* (10 C. P. 470) Draper, C. J., says: "Every provision for these purposes is a departure from the common law; and so far as is necessary to give these provisions full effect, we must hold the common law as superseded by them; but it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give." If we accede to plaintiff's argument, we must be prepared to hold that husband and wife may, by parol, put a tenant into possession at a yearly rent, and eject him as a wrong doer the following week or month. Our Legislature provides for the manner in which a married woman can, by deed, alien her estate, and the Act of 1859 seems not to have altered the law in this respect. We in no way frustrate the intention of the Legislature in favour of the married woman, by allowing the payment and receipt of rent on a parol demise, from year to year, to have the same effect as to the rights of the tenant as it had under the old law. I am not prepared to hold that, at all events, in cases where no deed is required, a good parol demise, from year to year, of the wife's freehold, may not be made by husband and wife. I am not deciding that it cannot be made by husband alone. I only deal with the point in judgment.

SOULE V. GRAND TRUNK RAILWAY COMPANY.

*Railways and Railway Companies—Posts on highway supporting signboard
—Damage to plaintiff—Company not liable.*

Where the plaintiff's horse, which she was driving along the highway, became frightened, and the vehicle, to which it was attached, was in consequence brought into collision with one of the posts supporting the "signboard" required by the Statute (C. S. C. ch. 66) to be erected across the highway, and damage resulted to the plaintiff: *Held*, that defendants would not be liable, merely for putting the posts in the highway, as the law allows them so to do, provided they place them in a reasonably proper manner, with a due regard to all the surrounding circumstances, although the posts necessarily obstruct the use of the road over the spots where they are placed.

Held, also, that the posts would not necessarily be an indictable nuisance. *Held*, also, that it would have been no objection to the plaintiff's right to recover, that the posts had been erected more than six months before the cause of action arose.

This was an action in which the declaration charged that defendants had wrongfully, improperly, and negligently, put and placed two posts, connected at top by a horizontal board, near the centre of a public highway: that defendants' railway crossed said street, near to said posts, and plaintiff was driving a horse and carriage on the highway, using due care in approaching near to said posts, when an engine of defendants passed along the railway near to said plaintiff, making a great noise, whereby plaintiff's horse became alarmed and swerved a little from the direct line on which plaintiff was travelling, and in so doing caused the carriage to strike violently against one of the posts, whereby the carriage was damaged and plaintiff thrown out and injured.

Plea, not guilty, by Statute.

The case was tried at London, before Wilson, J.

It appeared, from the plaintiff's own account, that she had driven into London to market, and was returning about 11, a.m., when she came to a point where defendants' track crossed the street: that posts were erected on the street, supporting a board with the usual notice, "Railway Crossing": that a space was left between the posts: that a locomotive was standing on defendants' track, not in motion

and not whistling : that her horse became frightened at it, and bore away to the left, when she tried to turn him about, but could not draw him from the post on the road : that he ran on and caught the left front wheel of the buggy, and broke the axle, and she was thrown out and dragged along : that the horse was not much frightened till he got against the post : that he was quiet, and she understood driving, and constantly passed along that road : that the animal ran along the track, then against the fence, and broke the waggon : that if it had not been for the post, she would have been all right.

Another witness saw the remains of a wheel against the post, and saw the horse running along the track, the plaintiff holding the reins and dragged along.

Plaintiff's son swore there was as much space on each side of the posts as between them.

Dr. Moore swore that the posts were inconveniently placed, too much to the west side, and that deponent had been within an ace of them while driving : that he had as often driven east of the posts as between them : that there was no difficulty in going between the posts unless the horse got frightened ; but, if frightened, it would be very hard work to prevent his running against one or the other. The posts had been up there for many years.

This was the plaintiff's case.

For defendants it was objected that the posts were put there by authority of the Statute, and more than six months' before the cause of action arose ; and that plaintiff's inability to guide her horse was contributory negligence, barring her recovery.

The learned Judge overruled the objections, but reserved leave to move on the six-months-point.

For the defendant it was proved that the posts were put up under the Railway Act ; that there was a space of 17 feet between the posts, and they were 16 feet from board to ground : that the two railway tracks were about 200 feet apart, and a man was kept to watch the crossing : that William Street and Bathurst Street, which intersect there,

were 66 feet wide each : that the railway track crossed the intersections diagonally.

One witness said he did not think the post dangerous, and that such posts were all over the country.

The learned Judge explained to the jury what the Statute required defendants to do as to railway crossings, and told them how telegraph poles and bridges were allowed to be put up : that defendants were not responsible for plaintiff's horse taking fright : that they could only be said to be liable, because they encroached on the highway : that the question must be, whether the posts were so placed as to be a nuisance, or dangerous as to the public use of the road : that in general only a narrow track of the road was used, and that the distance here left was similar to that between said posts all over the country. The case of toll-gates was noticed.

Plaintiff objected to the charge, and urged that defendants had no authority to put posts on the road at all.

The jury were also told that if plaintiff were guilty of neglect in managing her horse, so as to bring about her own injury, she could not recover.

The jury found for plaintiff, \$500.

In Michaelmas Term, *M. C. Cameron*, Q. C., obtained a rule on the leave reserved, or for a new trial on the law and evidence, to which *Crombie* shewed cause, and *McMichael* supported the rule, citing *Cornwell v. Metropolitan Commissioners of Sewers*, 10 Ex. 771.

HAGARTY, C. J., delivered the judgment of the Court.

The defendants are in no way chargeable because plaintiff's horse was frightened. The whole case against them is rested on their alleged wrongful act of placing posts on the highway. The accident to plaintiff might have equally happened if the horse had swerved against a farmer's waggon, properly and carefully being driven along the highway. The defendants erected the posts to support the board marking the railway crossing ; not for any purpose

of their own, or for any benefit or profit to themselves, but in the performance of a duty imposed on them by Statute. Sec. 12 of the Railway Act, Consol. Stat. C. ch. 66, sub. 5: "Signboards stretching across the highway, crossed at a level, by any railway, shall be erected and kept up at each crossing, at such height as to have 16 feet from the highway to the lower edge of the sign-board, and having the words "Railway Crossing" painted on each side of the sign-board, and in letters not less than six inches in length. By the 3rd sub-section it is provided that where the railway is carried over the highway, the span of the arch of the bridge shall be an open and clear breadth of not less than 20 feet. Sec. 9, sub. 5, empowers railroads to cross on highways, &c., but the highway shall be restored by the company to its former state, or to such state as not to impair its usefulness.

The case before us is very peculiar. The immediate cause of plaintiff's injury was her horse taking fright. For this no blame is to be attached to defendants; but plaintiff urges that if this post had not been in the highway, the horse would not have swerved against it. This argument would also apply to any case in which, by mistake of survey, a person's fence might project a few feet on a highway, and a horse ran against it. We have to consider the manner in which these posts were so placed, and the plaintiff's right to object to them, and defendants' liability to her.

For an ordinary obstruction on a highway, creating a common injury to all passers, the only remedy seems to be by indictment. As is said in the well known case of *Wilkes v. Hungerford Market Co.* (2 Bing. 281), "the question is, whether this is such a peculiar and private damage to plaintiff, beyond that suffered by the rest of His Majesty's subjects, as to enable him to sustain an action. * * When an individual sustains an injury from a nuisance, beyond that which is felt by the public at large, he may obtain redress by action, though for the public injury the offender can only be proceeded against

by indictment." See the latest case, *Winterbottom v. Lord Derby* (L. R. 2 Ex. 316).

If these posts be a nuisance, still, no private person could abate it, and the plaintiff, either intentionally or negligently driving against it, would be liable to defendants for injury to their property; as in *Dimes v. Petley* (15 Q. B. 283): "If there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it does him a special injury, and he can only interfere with it so far as is necessary to exercise his right of passing along the highway. * * We clearly think he cannot justify doing any damage to the property of the person who has improperly placed the nuisance on the highway, if, avoiding it, he might have passed on with reasonable convenience." This was the case of a wharf and jetty on the Thames, erected for some years, the jetty projecting into the navigable water of the river. The action was brought by the owner of the wharf and jetty against the owner of a vessel which was being towed up the river by a tug. As she passed by the wharf some colliers were in the way; to avoid them the tow rope was slacked, and the ship in consequence drifted up with the tide; she did not touch the wharf, and would have gone clear of every thing, had the jetty not projected into the navigable water way; as it was, she struck the jetty, tore it away, and did much damage. The defence was, that the jetty was a common nuisance, that defendant's ship had occasion to pass over that part of the navigation, was managed carefully, and in passing did the damage. The plea was held bad and no defence, for not averring that it was a necessity for defendant to navigate his ship over that part of the river, &c., &c. If the action had been for an injury sustained by the ship by striking against the jetty, it would have been much like that before us.

When the Legislature directed the railway company to place "signboards" stretching across the highway at every level crossing, we must assume they did not intend any thing either impossible or utterly unreasonable. They were

well aware that 66 feet was a common width of roads, and that some are 90 feet wide. A transverse board, with printed letters six inches long, stretched across a highway, at least 16 feet above the road, must be supported, and we can hardly imagine that the company should not be allowed to support it by posts placed somewhere on the highway. A board 66 feet long could with difficulty be placed so as not to be blown down, even at heavy cost. It was hardly meant to make the company purchase land on each side for the abutments. It was known that hundreds of level crossings would be required. The expense would be simply intolerable. It seems to me we must assume the Legislature licensed the company to support these sign-boards by posts on the highway. The charge and maintenance of the highways thus crossed, in the City of London, of course appertained to the corporation. These posts had been erected eight or nine years, at least, and no evidence was offered of any objection by the corporation. If an indictment had been preferred against the defendants for a nuisance arising from these posts, it would not, apparently, be sufficient to charge merely the erection of the posts on the highway; it must be laid "*ad commune nocumentum*," and whether it was so or not would be a question for the jury: *Regina v. Betts* (16 Q. B. 1022). There the jury found, "Guilty of building the bridge, but we do not consider it to be an obstruction to the navigation or the drainage." This was held to amount to a verdict of acquittal. See also *Rex v. Tindal* (6 A. & E. 143).

The Telegraph Companies Act, Consol. Stat. C. ch. 67, sec. 8, allows the companies to put their posts, &c., along and upon any public road, &c., "provided the same are not so constructed as to incommode the public use of such roads, or to impede free access to any house," &c.

In *Regina v. United Kingdom Electric Telegraph Co.* (9 Cox. 137, 6 L. T. N.S. 378) 134 poles were put down along the road, with the assent of the authorities and guardians of the highway, but the company had not obtained Parlia-

mentary powers. It was held by Martin, B., and his ruling was confirmed on argument, in Term, that the public are *prima facie* entitled to the use of the entire space between the fences of a road, not confined to the part metalled or kept in repair; and that in the case of permanent posts erected on the road, without lawful authority, by defendants, for their profit, with the object of keeping them there permanently, and of such size and dimensions as to obstruct and prevent the passage of carriages and horses, or passengers, on the part of the highway where they stood, the jury ought to find them guilty, though not placed on the metalled part of the road, or that they thought sufficient space for public traffic remained. This, no doubt, is the law, where it is sought to compel the removal of unauthorized obstructions of a permanent character from all parts of the public way. See also *Regina v. Train* (2 B. & S. 640).

It is to be borne in mind that the erection of these posts and signboards was not a matter in any way for the profit of defendants, or for the use of their railway; it was, on the contrary, for the express benefit of those who use the highway, and in furtherance of the safe and convenient user thereof. In *Train's* case, just cited, the indictment was for laying rails for a street railway in a London street. It was urged by defendants' counsel that it was a question for the jury whether there was a nuisance, or whether what was done was not a reasonable and convenient arrangement for the use of the highway by the public generally. Crompton, J., says, assuming that such a principle could be established: "This case does not come within that principle, seeing that this was not an arrangement for the ordinary use of the highway. * * It may very fairly be said, for instance, that the raising of a portion of a highway, for the use of passengers, is allowable; but that is for the use of the highway *qua* highway; and I do not say that there may not be cases where arrangements for the advantage of one class of persons may be allowable, though mischievous to another class. But what has been done here, is not making any arrangement for the use of

the highway, in the ordinary manner of using a highway." See also *Regina v. Sheffield Gas Co.* (18 Jur. 146, in notes).

On the whole, I am of opinion as follows: The defendants are directed to erect these sign-boards "stretching across the highway," and that the law that directs them so to do, authorizes their user of the highway for carrying out the directions: that it is not for their own profit, or for the user of their railway, but for the protection and convenience of the public using the highway, and for the sure, safe, convenient, and uninterrupted use of such highway, where it is crossed on the level by such railway: that if it appear that the defendants have performed what the law has compelled them to do, in a reasonably proper manner, with a reasonable regard to all the surrounding circumstances, that they are not responsible for an injury sustained by any person running against their posts, although such posts may, from being erected on the highway, necessarily interfere with the passing of persons over the part of the highway on which they were so fixed; nor would such posts be an indictable nuisance.

If the evidence presented the case in the foregoing aspect, I do not see any thing to be left to a jury, who would be apt to consider that because the plaintiff sustained the injury from the post, and that the latter was in the roadway, that therefore it must be a nuisance for which defendants are responsible.

I think there is not any thing in the objection as to the six months' limitation. This can hardly be considered to be "a damage sustained by reason of the railway"; and, in any event, plaintiff could not possibly sue until she had sustained damage. The action was brought within six months of the injury sustained.

I think, also, that the fact of the municipality permitting these posts to be in the street so many years without interference, ought to have weight in forming an opinion on defendants' liability. Probably, but for this accident, no one would have thought of considering such posts a nuisance, or in a different light from a toll-gate or bar,

or the numerous projections from shop fronts, forming shades over the sidewalk and supported by poles in the highway. This accident might have probably occurred if the posts had been 20 or 25 feet apart, or had been half a mile distant from the place where the horse first became unmanageable.

I think there must be a new trial. The verdict is most unsatisfactory, and the learned Judge who tried the case views it in the same light. As to the immediate cause of the injury, see *Flower v. Adam* (2 Taunt. 314); *Marriot v. Stanley* (1 M. & Gr. 568); *Ridley v. Lamb* (10 U. C. 354.)

Rule absolute for new trial.

PATTYPIECE V. MAYVILLE.

County Court cases—Issues in law and fact—Law Reform Act not applicable—Special case in action in County Court, not cognizable in Superior Court.

In County Court cases, where there are issues in law and in fact upon the same record, the Law Reform Act does not authorize the issues in fact to be tried at the Assizes; and where, after a trial under such circumstances, a case came before the Court, on motion against the verdict, the Court, after argument and consideration, refused to pronounce judgment on the merits of the case, as *coram non judice*, but merely set aside the verdict without costs.

In a County Court case, tried at the Assizes, after verdict for defendant *in that suit*, the parties agreed upon a special case *in the action in that Court*, and not upon a case originating in a Superior Court: The Clerk, with the approval of the Court, refused to receive it, on the ground that the only mode of bringing such a case before the Superior Court was the ordinary statutory one, by way of appeal.

This was a County Court case, tried before Wilson, J., at Sandwich, without a jury.

The plaintiff declared in replevin for that the defendant took a bay mare of the plaintiff, and unjustly detained the same against sureties, &c.

The defendant made cognizance acknowledging the taking the mare on the plaintiff's premises on lot No. 5, in the 7th concession of the township of Anderdon, and justly, because

the plaintiff at the time when, &c., was an inhabitant of school section No. 4, in the township of Anderdon, owning property in that school section, and was duly assessed and liable to be rated in respect thereof for school purposes; that a school rate was imposed by the trustees of the said section, and the plaintiff was thereby rated for and in respect of such property for the sum of nine dollars; that a rate bill and warrant, whereon the plaintiff's name was inserted for the said sum, was delivered by the said trustees to one Gabriel Boussie, who was the collector duly appointed for the said school section, and the defendant, as the bailiff of the said Boussie, so being such collector, demanded the amount of the said rate from the plaintiff; but the plaintiff neglected and refused to pay the same, wherefore the defendant, as bailiff to the said Boussie, as such collector, well acknowledged the taking the said rate, and justly, for and in the name of a distress for the said rate so due by the plaintiff, which said rate still remained due and unpaid.

The plaintiff, for a plea to the cognizance said, that the school rate in the cognizance mentioned, was not duly imposed in respect of the property of the plaintiff in the said school section, inasmuch as the said rate was not levied according to the valuation of taxable property in the said section, as expressed in the assessors and collector's roll of the said township, pursuant to the statute in that behalf, but on the contrary, the said rate was levied on a portion only of the said taxable property, to wit, on a fourth part thereof. Upon this plea issue was joined.

The defendant also, by leave of the Judge of the County Court, wherein the action was pending, demurred to the plea, for the following causes alleged, namely, that the plea was no answer to the defendant's cognizance in this, that it did not shew anything whereby the distress was made illegal. 2nd. That the collector was not bound to inquire into the legality of the rate, or the proceedings taken by the trustees, or to look beyond the rate-bill and warrant, which being legal on the face of them, the collector was

bound to collect the rate. 3rd. That the plea did not shew that the plaintiff was not liable for the rate.

The plaintiff joined in demurrer, and upon the record brought down for trial containing these issues in fact and in law so joined, was the following entry in the form A., to the Law Reform Act of 1868.

“And the plaintiff, *in order to expedite proceedings* in this case, having elected to try the issues, and assess the damages at the sittings of Assize and *Nisi Prius*, to be holden at Sandwich, in and for the County of Essex, on the 7th day of November, 1870, the said issues will be tried, and the said damages assessed at the said sittings accordingly.”

At the trial a rate bill was produced, having the plaintiff's name entered thereon as rated for \$8.87½, upon a valuation of \$1,000, on lot No. 5, in the 7th concession of the Township of Anderdon. The rate bill was entitled as follows: “Rate bill of persons liable for school fees in School Section No. 4, in the Township of Anderdon, County of Essex, Ontario, for the half-year ending 30th June, 1870— $\frac{5}{8}$ ths of a cent in the dollar.” At the foot of a column in the rate bill, shewing the respective values of the assessed property of each person in the bill, the total amount of such assessed value is summed up as being \$18,500, and at the foot of a column shewing the amount set opposite the name of each person, and to be levied, the total amount contained in such column was entered as being \$127.50. Annexed to the rate bill was a warrant to Gabriel Boussie, signed by the trustees of the school section, authorizing and requiring him to collect from the several individuals named in the rate bill, the sums of money set opposite their respective names. It appeared in evidence that there were, besides the persons named in the rate bill, 21 other persons, colored, residing within the school section, having taxable property, assessed in the whole at \$10,605. These colored persons had formerly a separate school of their own, but for five years or more prior to the rate being imposed, they had not maintained such separate school, nor for such period had they sent

their children to such nor to any school, nor had they been rated for a separate or for any school; they had been, in fact, exempted from all taxation for school purposes. The contention of the plaintiff was, that the property of these persons, constituting, as it did, one-third of the whole taxable property for school purposes in the section, having been excluded from the rate bill, the rate was void, as not being in accordance with sub-sec. 12, of sec. 27, of ch. 64, of the Consolidated Statutes of Upper Canada.

The learned Judge was of opinion that, in the words of the plea, the rate was not levied according to the valuation of taxable property in the said section, as expressed in the assessment roll of the township, pursuant to the Statute, but was levied upon a portion only of the said taxable property; he was not, however, prepared to say that the rate was not duly imposed, as alleged in the plea, in respect of the plaintiff's property. He was of opinion that the rate was not absolutely void so long as the by-law or resolution sanctioning it stood unimpeached. He therefore entered a verdict for the defendant, and he reserved leave to the plaintiff to discuss his right to succeed *either in this suit, or* by the parties making a special case for the opinion of one of the Superior Courts, to be agreed upon by the parties, and in case they should differ the case to be settled by himself; "the whole case of fact and of law to be determined by the special case, to be settled as afore-said." The parties afterwards agreed among themselves upon a special case *in the action in the County Court*, and not as upon a case originating in a Superior Court, and they tendered the case so agreed upon to the Clerk of this Court, to be entered on the paper. The Clerk of the Court, with the approval of the Court, refused to receive such a special case, as the Court considered there was no authority which sanctioned the removal of a cause pending in the County Court, wherein a special case was agreed upon, into a Superior Court, otherwise than by way of appeal. Under these circumstances the plaintiff was permitted, after the expiration of the four days for moving

for new trials, to move against the verdict, pursuant to the leave reserved at the trial.

F. Osler shewed cause, and raised a point, upon which he chiefly relied, which had not been taken at *Nisi Prius*, namely, that upon the authority of *Spry v. McKenzie* (18 U. C. 161) the collector was protected by shewing a warrant good upon its face, and that he was not to be affected by any illegality in the rate. The same point was raised by the demurrer.

Robinson, Q. C., contra, cited many authorities, contending that in replevin the party making cognizance, being an actor claiming a return of the goods, must shew a good defence *in omnibus*, and therefore must shew a good rate; and, moreover, that upon the issue in fact joined, it was not open to the defendant to raise this point, for the issue joined was upon facts alleged, shewing the rate to have been illegally levied; and he contended that thereby the defendant had elected, *quoad* the issue in fact, to stand upon the validity of the rate.

GWYNNE, J.—I have looked into all the authorities cited, and many more besides, and am quite prepared to express my opinion upon the merits of the case, but feel constrained to abstain from doing so, being impressed with the conviction, the more I consider the case, that the record is not in reality judicially before us at all.

In Superior Court cases there is a rule of Court, that unless it is provided in the order granting leave to a party to plead and demur to the same pleading, that the issues in fact shall be tried first, they shall not be tried until after the demurrer is disposed of. In cases in our own Court, we scrupulously adhere to this rule. I presume that the same rule exists in the County Court, for the intention is, undoubtedly, that there should be uniformity of practice in the Superior Courts and in the County Courts. Assuming the rule to exist in the County Court, then the order, granting leave to the defendant to join issue in fact upon, and

to demur to, the plaintiff's plea, being annexed to the record, we see that there is no provision made in this case for trying the issue in fact first, and consequently this case could not have been brought down by the plaintiff to trial in the County Court, before the demurrer was disposed of. Now, I do not think that the Law Reform Act authorizes the plaintiff, by entering the suggestion required by that Act, at his election to procure a trial of the issue in fact in the Superior Court at the Assizes, contrary to what is the practice of the Superior Court in a like case pending in one of those Courts, and at a time when, by the practice of the County Court *in the particular case*, it could not have been tried in the County Court. Indeed, it seems to me that when a party, in a cause pending in a County Court, obtains leave to try issues in fact upon, and to demur to, the same pleading, or, indeed, when there is a demurrer upon the record at all, that case is thereby removed from the operation of the second sub-section of the seventeenth section of the Law Reform Act of 1868. To hold otherwise, would, as it appears to me, operate to entangle the case in extricable confusion, instead of "expediting proceedings," which was the object the Law Reform Act had in view.

This case very plainly illustrates the difficulties surrounding the sanctioning the practice here contended for. The parties have joined issues in law to be decided by the Judge of the County Court; judgment must be given upon these points of law by the Judge of the County Court; his judgment may be removed, by appeal or error, to a Superior Court; but it is only as an appellate tribunal that the issues in law so joined can be brought before this Court. But the issues in fact joined in this case raise the same identical point for decision as the demurrer does. Now, upon a motion made in respect of a verdict under sub-sec. 5 of sec. 17 of the Act of 1868, as amended by sec. 8 of the Act of 1869, the record is transferred into the Superior Court, where the motion is made; but, without the record, demurrer books may be made up

of the issues in law, and they may be argued in the County Court, and the judge may give his judgment thereon before judgment is given in the Superior Court, upon the motion in respect of the verdict; but, when judgment is given upon that motion in the Superior Court, *it is final* by sec. 5 of the Act of 1869. Now, if the judgment so given should be the opposite of that given by the Judge of the County Court upon demurrer, what is to become of the case? The judgment given on the issue in fact *is final*, and shall not be subject to appeal; but the judgment on demurrer is at variance with it. Can part of the record, namely the demurrer, be appealed, after the *final* judgment, so as to procure uniformity on the record? Granting that it could be, certainly this procedure does not seem calculated to "expedite proceedings," as contemplated by the Law Reform Act. It may be said that the Judge in the County Court would not hear the case upon the demurrer, or, if he should hear it, would not give his judgment until the Superior Court should dispose of the motion in respect of the verdict, and then would give his judgment in accordance with that of the Superior Court; but, in answer to that argument, it is sufficient to say, that there is no law or practice requiring the County Court Judge so to act; nor does the Law Reform Act make any provision for such a case. We may fairly conclude, then, that the Law Reform Act contemplated no such contingency as possible; and, therefore, that it applies not to such a case, but only to those simple cases of issues in fact and assessments of damages, which, being tried and disposed of by the Superior Court, upon a motion made in respect of the verdict, dispose of the whole record. A reference to the clauses of the Act would seem to support this view. There is nothing whatever said in the Act of an assessment of *contingent* damages on a demurrer. The second sub-section of section seventeen of the Act of 1868, provides that the *postea* shall be entered on the roll of the issues in fact, and assessment of damages, in actions in any County Court, by that section authorized to be tried at *Nisi Prius*, in a form which

shews that what was contemplated was a final judgment, thus : " And the jury or Judge at the said sittings of Assize and *Nisi Prius* found that (stating the finding in the issues) ; or, and the jury or judge at the said sittings of Assize and *Nisi Prius*, assessed the damages of the plaintiff at —, over and above his costs. Therefore," &c.; indicating a final judgment to follow on that finding, and not that the finding should be contingent upon any judgment yet to be given on a demurrer. Then the fourth sub-section provides, with the object of the Act, of expediting proceedings, in view that judgment may be entered on the fifth day after verdict rendered or damages assessed, unless the Judge who tried the cause shall certify on the record under his hand that the case is " one which, in his opinion, *should stand to abide* the result of a motion that may be made therein in term ;" not to abide the result of the judgment of the Judge of the County Court upon issues in law joined. The cases, then, which the Act contemplates may be taken down, at the instance of the plaintiff, from the County Court to be tried at the Assizes, are such cases wherein final judgment may be entered on the fifth day after the verdict, unless the Judge who tried the issues should grant leave to move against the verdict ; but a record containing a demurrer going or not going to the whole cause of action, and requiring an assessment of contingent damages, whether the demurrer be or be not to the same pleading whereon an issue in fact is joined, is not such a case. Such a record, therefore, is not within the contemplation of the Law Reform Act, and cannot be brought down to *Nisi Prius* ; and, if brought down, although no objection may be made by the defendant or suggested by the Judge, it is, as it seems to me, *coram non judice*, whatever the Judge may do in the matter.

It would be highly inconvenient that issues in fact should be capable of being so removed from a County Court to a Superior Court, while issues in law are joined upon the same record, which may or may not depend upon the same points as may be raised upon the issues in fact, and which

issues in law can only be disposed of by the Judge of the County Court, before they can ever be constitutionally brought into the Superior Court.

I am, of opinion, therefore, that the Law Reform Act does not authorize the issues in fact joined upon this record to be transferred from the County Court to be tried at the Assizes; and that all that we can do is, to make the rule absolute to set aside the verdict, but without costs, expressing no opinion upon the merits, which are not judicially before us.

I have myself refused to try issues in like manner brought down to trial before me, it appearing on the record that there were demurrers pending to the same pleadings as those upon which issues in fact were joined. But the objection is not, in my opinion, limited to such cases; it extends to all cases wherein there appear to be issues in law joined upon any of the pleadings, whether there be or not issues in fact upon the same pleadings.

HAGARTY, C. J.—I agree with the result arrived at by my brother Gwynne, on the short ground that the Legislature did not, in County Court cases, authorize the trial of issues or assessments of damages before the Superior Courts, so long as there is an undetermined demurrer on the record as to the legal validity of the very issue so tried and moved against.

Until the Legislature expressly so declare, I decline believing that we are to try issues, and finally dispose thereof on motion, while the County Court Judge can, either pending our proceedings or after their conclusion, decide against the legal sufficiency of the very facts which we are trying or determining, whether they exist, or do not exist.

GALT, J., concurred.

Rule absolute for new trial, without costs.

JENKINS V. THE CORPORATION OF THE COUNTY OF ELGIN.

By-law—Sealing of Notice—22 Vic. ch. 66, secs. 75 & 76—29 & 30 Vic. ch. 51, sec. 196, sub-sec. 6—“Majority”—Construction.

Held, that a “majority” of the electors referred to in the Railway Act of 1859 (22 Vic. ch. 16, secs. 75 & 76) and the Municipal Institutions Act of 1866 (29 & 30 Vic. ch. 51, sec. 196, sub-sec. 6), required to assent to a by-law, is not an absolute majority of all the existing qualified electors, but a majority of those coming forward to vote for the same.

Held, also, that the notice of a by-law for the granting of aid by a municipality to a Railway Company, should be published in accordance with the provisions of the Municipal Acts.

Held, also, that the objection to a by-law that it was not sealed, when submitted to the electors, was untenable.

Anderson applied for a rule *nisi*, to quash a by-law in aid of the Canada Southern Railway Company, on the following grounds: 1. That the by-law was not advertised four times in each newspaper printed within the limits of the municipality.

2. That when it was submitted to the ratepayers, it was not sealed.

3. That it was not passed with the consent first had of a majority of the electors.

As to the first ground he referred to the Railway Act ch. 66 of Con. Stat. C. sec. 77.

On the third ground he referred to *Simpson v. County of Lincoln*, 13 C. P. 48; *Billings v. Municipal Council of Gloucester*, 10 U. C. 273.

Curia advisari vult.

HAGARTY, C. J.—The Railway Act of 1859, ch. 66, secs 75 & 76, allows municipal corporations to subscribe for stock or lend money to railways, but forbidding their so doing, “unless and until a by-law to that effect has been duly made and adopted with the consent first had of a majority of the qualified electors of the municipality, to be ascertained in the manner determined by the by-law, after public advertisement thereof, containing a copy of such proposed by-law, inserted at least four times in each newspaper printed within the limits of the municipality,” &c.

The Municipal Act, ch. 54, sec. 346, contained provisions for taking stock and subscribing under this Railway Act; and the Municipal Act of 1866, sec. 349, had a similar provision, with the words, "But no municipal corporation shall subscribe for stock or incur a debt or liability for the purpose aforesaid, unless the by-law, before the final passing thereof, shall receive the assent of the electors of the municipality in manner provided by this Act."

The Ontario Act, ch. 32, 33 Vic., incorporates "The Canada Southern Railway Company." Sec. 5 allows municipalities, "in addition to the powers conferred by the clause respecting Municipalities in the Railway Act, to give money by way of bonus, &c., to the company, "Provided always, that no such loan, bonus, &c., be given, except after the passing of the by-law for that purpose, and the adoption of such by-laws as provided by the Railway Act; *provided always*, that any such by-law, to be valid, shall be made in conformity with the laws of this Province respecting municipal institutions."

We have, then, these two provisions for a by-law giving a bonus to a railway company.

First.—It must be a by-law *passed and adopted*, as provided by the Railway Act.

Secondly.—It must be a by-law *made* in conformity with the laws respecting municipal institutions.

The Railway Act provides for a by-law being made for the purpose of aiding the railway, and then for its adoption with the consent of the majority of the electors, leaving it to the by-law to determine how that majority is to be ascertained.

This would seem to satisfy the words in the last Special Act as to *passing and adoption*, provided by the Railway Act.

Turning to the existing municipal law, we find sec. 196 (Act of 1866) provides, "In case a by-law requires the assent of the electors, &c., before the final passing thereof, the following proceedings shall be taken for ascertaining such assent." Provision is then made for fixing days of polling; &c.

Sub-sec. 2. The council shall, for at least one month before the final passing of the proposed by-law, publish a copy thereof in some newspaper published weekly or oftener in the municipality, &c.

Sub-sec. 4. That a poll be taken, and proceedings conducted in the same manner as nearly as may be as at a municipal election.

Sub-sec. 6, directs the clerk of the council to add up the number of votes for and against the by-law, and to certify to the council under his hand, whether the majority have approved or disapproved of the by-law.

I am of opinion that the majority required to assent to a by-law, is not an absolute majority of all the existing qualified electors, but a majority of those coming forward to vote for or against the proposition submitted to them.

It stands thus :—

1. The assent of the majority is required.
2. It is devolved on the municipality to determine the manner in which the assent of such majority is ascertained.
3. The Legislature has further itself directed, that this is to be ascertained by giving full opportunity to all to vote, if they so desire.
4. The majority of those actually voting must be considered the majority of the electors.

I think this result is clear on the statutes.

The provision quoted as to the clerk certifying whether the majority have approved or disapproved, must certainly mean the majority on the poll-books. He could hardly in fact ascertain the actual majority of all existing electors, except by personal enquiry outside the poll-book. He might find 500 names on the assessment roll at the beginning of the year. Ten or twenty per cent. of that number might have died, or sold their property, and left the country, before the vote was taken.

It never could have been intended that an absolute majority must come forward and vote. The difficulties would be almost insuperable, and require most complicated machinery. Had the Legislature intended any such result,

we may assume that very different language would have been used.

In the case before us, the applicant does not venture to swear that a majority of the electors have not voted. He merely states that so many names appear on the assessment roll for 1870, and that a less number than half voted for the by-law, and asks us to infer therefrom that the law did not receive the assent of a majority.

As to the sufficiency of the notice, I think the proper construction is, that the notice provided in the Municipal Act is sufficient, and ought to govern.

The Railway Act requires it to be advertized four times at least in each newspaper published in the municipality. If only a daily paper existed, four insertions on four consecutive days would suffice. In a semi-weekly, two weeks would cover the time.

The Municipal Act makes a much better provision, requiring publication for at least one month in some newspaper in the locality.

Here the objection is that, as to two out of three of the local newspapers, the notice only appeared three times, instead of four.

I think we are bound to hold that the notice to the public is to be governed by the provisions of the Municipal Act.

The Municipal Loan Fund Act (16 Vic. ch. 22), and again Con. Stat. C. ch. 83, provides for the passing of by-laws for aid to railroads and other public objects, after a month's notice and publication "in some newspaper," &c.; and formal provisions are introduced for ascertaining the assent or refusal of the ratepayers by the votes of those present at appointed meetings, and giving power to demand a poll; and the majority of votes polled is to be certified, &c.

In some places the words are, "the qualified municipal electors, or such of them as choose to attend the meeting, shall take the by-law into consideration, and approve or disapprove of the same": sec. 13, ch. 83: 1859.

In *Boulton v. Corporation of Peterborough* (16 U. C. 380) the by-law was submitted to a public meeting of the electors: it was carried, and no poll demanded.

The objection was taken that the consent of the majority of the electors was not obtained. The point does not seem to be much argued.

Sir J. Robinson says, "The first of the objections is, that the consent of the ratepayers had not been obtained. * * By this we understand to be meant that the electors were not polled; but that could not be necessary unless some one objected, and a poll was demanded. It is declared that the by-law was approved of by those present unanimously; and there is no evidence to the contrary."

The case cited of *Billings v. Corporation of Gloucester* (10 U. C. 273) can hardly be considered as any authority on the point. The by-law was clearly bad, irrespective of the voting. No cause was shewn, and the proceeding was under a special Act.

We have directions in statutes for surveys and other matters, in which doubtless the proved assent of an absolute majority of parties interested is necessary. But this is wholly apart from any question of voting or ascertainment of majorities in prescribed manners, and confined to matters specially affecting individual properties.

We think the objection as to the by-law not being sealed, when submitted to the electors, is untenable. It was only a proposed by-law, and did not become an actual by-law until approved of. It is easily distinguishable from the case cited from the Queen's Bench.

GWYNNE, J.—The Canada Southern Railway Act (33 Vic. ch. 32, sec. 5,) in my opinion, is to be read as conferring upon municipalities (in addition to the powers conferred upon them by the clause respecting municipalities in the Railway Act,) power to give money, by way of bonus, to the Railway Company, provided always, that no such bonus shall be given, except (as provided by the Railway Act in relation to the taking of stock, that is to say), after the passing of a by-law for that purpose, and the adoption of such by-law by the electors; provided always, that such by-law, to be valid, shall be made in conformity

with the laws of the Province respecting municipal institutions; thus making the validity of the by-law to depend wholly upon its conformity to sec. 195 of 29 & 30 Vic. ch. 51., which this by-law does. It is not, therefore, open to the first objection taken to it. There is nothing in the second objection; and as to the third, I entirely concur that the majority of the qualified persons who voted upon the by-law, must be taken to express the voice of the electors.

GALT, J., concurred.

Rule refused.

ERWIN V. TOWNSHIP OF TOWNSEND.

By-law—Adoption by majority—Voting list of voters under 29 & 30 Vic. ch. 51, sec. 196, sub-sec. 7—Construction.

Held, that the Statute providing for a poll to be taken for the passage of a by-law, which requires the assent of the electors of a municipality, requires only that the by-law shall be adopted by the majority of those qualified electors who actually do vote, and not of those entitled to vote.

Held, also, that the list which the Statute (29 & 30 Vic. ch. 51, sec. 196, subsec. 7) requires the Clerk of the Municipality to furnish the Returning Officer with is a list containing the names of all freeholders and tenants of realty assessed on the roll to an *amount sufficient* to entitle them to vote at *any* municipal election.

Anderson obtained a rule *nisi* to shew cause why a by-law of the township of Townsend, to aid and assist the Canada Southern Railway, by giving \$30,000 to the said Company, by way of bonus, should not be quashed on the grounds:—

1. That the same was not adopted with the consent first had of a majority of the qualified electors of the municipality; and,
2. That no verified list of the electors was furnished by the clerk to the returning officer for the purpose of taking the votes upon the said by-law.

Curia advisari vult.

GWYNNE, J., delivered the judgment of the Court.

The persons qualified to vote upon a by-law, which requires the assent of the electors of a municipality, are, by the 7th sub-sec. of the 196th sec. of 29 & 30 Vic. ch. 51, declared to be such ratepayers only as are rated on the assessment roll for an estate of freehold, either legal or equitable, of sufficient value to entitle them to vote at *any* municipal election, or of a leasehold, the duration of which shall not be less than the period of time in which the debt to be contracted, or the money raised under such by-law, is payable, and in the lease for which leasehold the lessee covenants to pay municipal taxes.

The persons qualified to vote at a municipal election are, by 29 & 30 Vic. ch. 51, sec. 75, as amended by ch. 52, sec. 75, declared to be the male freeholders thereof, resident or not, and householders resident therein for one month next before election, who are natural born or naturalized subjects of her Majesty, and of the full age of twenty-one years, who were severally rated on the last revised assessment roll for real property in the municipality, held in their own right, or that of their wives, as proprietors; or tenants of the actual value, in townships, of one hundred dollars.

The rate imposed by the by-law extends over a period of twenty years.

The case disclosed by the affidavits filed is that upon the assessment roll of 1870, which at the time of the vote being taken, on the 24th November, 1870, was the last revised assessment roll, there were assessed in the township, as freeholders and tenants, 1050 persons, of which number 758 were rated as freeholders, and 292 as tenants; that of the 758 freeholders 18 were assessed for less than \$100 each, and 24 were females; and, consequently, that the assessment roll shewed only 716 freeholders qualified, and 292 tenants having the ratable value of qualification. The affidavits disclose that of 391 persons who voted for the by-law, 291 only were qualified as freeholders, and the remaining 100 were tenants, who, it is contended, were not

qualified at all, as not appearing on the assessment roll to have leases extending over the twenty years, during which the rate will continue; and the affidavits further say that deponents verily believe that none of these have leases of so long duration. The affidavits further shew that of 201 votes polled against the by-law, 171 only were qualified as freeholders, and the remaining 30 were tenants, but who also were unqualified for the like reason as is alleged in disqualification of the tenants who voted for the by-law. The point, therefore, of the first objection to the by-law is, that only 291 qualified voters voted for it, and 171 against it; and it is contended, therefore, that the by-law has not obtained the assent of an absolute majority of the qualified electors of the township.

For the reasons given in *Jenkins v. The Corporation of Elgin* (*ante* p. 325), I am of opinion that the statute providing for a poll to be taken at which every qualified elector is given the opportunity of voting, requires only that the by-law should be adopted by the majority of those qualified electors who do vote. The whole spirit of our institutions, unless the contrary is clearly expressed, is, where a poll is given, that the majority of those who do vote shall be taken to express the voice of the majority of the electors; and the 196th section of 29 & 30 Vic. ch. 51, shews very plainly, I think, such to be the intention of the Legislature.

In case a by-law requires the assent of the *electors* a poll shall be opened as provided by the section; and when taken the sixth sub-section says, "the clerk" (of the council which proposed the by-law) "shall add up the number of votes for and against the same, and shall certify to the council under his hand whether the majority," &c., (what majority can this mean, but the majority ascertained as the result of his adding up the votes *for* and *against* in the poll-book?) "have approved or disapproved of the by-law;" and *that majority*, so ascertained, is taken to express the determination of the *electors* of the municipality upon the by-law.

Now, assuming all the tenant votes given to be, as the

affidavits filed insist, illegal, there still remain, as appears by the poll-book, 291 qualified voters who voted for the by-law, and 171 against it. The by-law, therefore, cannot be assailed for anything contained in the first objection.

Now, as to the second objection. The returning officer was the clerk of the township, whose duty, by sub-sec. 7 of the said 196th section, is "to furnish the returning officer with a verified list of those entitled to vote on such by-law." Filling this double capacity, what he did was to use, in taking the poll, a list prepared from the assessment roll, which he certified by his oath, subscribed with his hand, and sworn before a justice of the peace, to be a true and correct list of the names arranged alphabetically of all the male freeholders and householders rated upon the then last revised assessment roll for real property, to the amount of one hundred dollars and upwards, as doth qualify them to vote at the election to be held on Monday, the 2nd day of January, 1871 : 29 & '30 Vic. ch. 51.

The point of the second objection is, that it is contended to be the duty of the clerk to provide for the taking the poll upon the by-law "a verified list of those entitled to vote on the by-law;" and that, therefore, no tenants should appear upon the list except such as are qualified to vote, not at a municipal election, but on the by-law; that is to say, only such tenants as, being rated for a value entitling them to vote at a municipal election, hold under leases extending over a period of not less duration than the period of time during which the rate is to be levied, and who by their leases covenant to pay municipal taxes. Now, the list which the clerk is to make out, is to be taken from the last revised assessment roll upon which these matters, which it is contended the clerk should verify as to the leases, do not and could not appear. The contention, therefore, is that the clerk is required by the Act to do an impossibility, and that the Act, or so much thereof, as provides for obtaining the assent of the electors of a municipality to a by-law, which requires such assent before the final passing thereof, is a dead letter. *Lex non cogit ad*

impossibilia. What, therefore, the statute requires is, that the clerk should insert upon the list the names of the male freeholders and tenants of realty assessed on the roll to an amount *sufficient* to entitle them to vote at *any* municipal election.

If the by-law should be carried by a majority made up of votes of tenants who had not the qualification required by the 7th sub-sec. of the 196th sec. of 29 & 30 Vic. ch. 51, it could not be sustained. But here the parties applying for the rule shew that, after deducting the votes of all tenant voters, assuming them all to be disqualified, there is still a large majority of legal votes in favour of the by-law.

The rule, therefore, must be refused.

Rule refused.

BEECHER ET AL. V. AUSTIN.

Chattel mortgage—Validity of.

A chattel mortgage purported to secure \$1600, acknowledged to have been paid by the mortgagees, the property mortgaged being 2500 logs, and the proviso for redemption being in payment of the \$1600, at 7 per cent., on or before 1st September, *or by delivering lumber of first and second classes, as agreed between the parties, to that value.* The agreement, which was of even date, declared that in consideration of the \$1600 then paid and advanced to the mortgagors by plaintiffs, "*which sum is collaterally secured to the parties by chattel mortgage bearing even date herewith on the same logs,*" &c., the mortgagors agreed to deliver to plaintiffs all the first and second class lumber made at their mill on or before 1st October then next; and plaintiffs agreed to pay at the prices named, "*or, if the advance now made is not exhausted, to allow them for the lumber so delivered at rates aforesaid.*"

The affidavit of the mortgagees was in the usual form, under sec. 2 of the Chattel Mortgage Act.

Held, that the mortgage was one within the 1st and 2nd sections, and not the 5th section, of the Chattel Mortgage Act, and that on the authority of *Baldwin v. Benjamin*, 16 U. C. 52, it was good and could be upheld against the objection, that it did not truly shew the real transaction between the parties.

THIS was an interpleader issue tried before Gwynne, J., at Barrie.

The plaintiffs claimed as mortgagees under a chattel mortgage from Fisher & Elliott, the execution debtors.

The facts appeared to have been as follow :

On the 24th January, 1870, the day on which the mortgage was executed, there was an agreement entered into between the plaintiff and Fisher & Elliott, whereby, in consideration of the sum of \$1,600 therein admitted to have been received by them, and for securing repayment whereof the agreement stated that the mortgage had been given, Fisher & Elliott agreed to sell and deliver to the plaintiffs, at Washago, all the first and second class lumber which they should make at their mill, at certain rates therein stated, and the plaintiffs agreed to pay for the said lumber at the said rates, or, if the advance then made was not exhausted, to allow for the lumber so delivered and piled at Washago, and culled and accepted by them. There was nothing mentioned in the agreement as to the logs from which the lumber was to be manufactured.

The mortgage above referred to was dated on the same day and was made between the same parties, and stated that the parties thereto of the first part (Fisher & Elliott), in consideration of the sum of \$1,600 to them in hand well and truly paid, granted to the parties of the second part all those 2,500 logs, containing by computation 600,000 feet "of lumber, and all the lumber to be made therefrom, which saw logs are now lying on the bank of the Koshubogamog River, or within the mill yard, on lot 12, east side of the Muskoka Road." There was a proviso, as follows, for making void the same : "If the parties of the first part shall pay to the parties of the second part the full sum of \$1,600, with interest for the same from the date of the date of the mortgage, at 7 per cent. per annum, on or before the first day of September next, or by delivering lumber of first and second classes, as agreed between the parties, to that value." This mortgage was accompanied by an affidavit made by one Ostrander, as agent for the defendants, in the usual form of a mortgage taken as security for a prior debt or for a present advance. There was also an authority from the plaintiffs empowering Mr. Ostrander, "our agent, for the purpose of taking a chattel

mortgage from Amos Fisher and Andrew Elliott for securing to us the payment of the sum of \$1,600 advanced by us to them this day." This authority was not under seal. The original authority was annexed to the mortgage.

This was the first transaction between the plaintiffs and Fisher & Elliott, and the mortgage was taken to secure the plaintiffs, as Fisher & Elliott were strangers to them, and were not considered as men of means.

The money was paid as follows, according to Ostrander's evidence: "I gave two cheques of \$250 each to Fisher & Elliott, the day the mortgage was executed, and at their request I retained in my hands \$1,100, subject to their order, as Mr. Fisher did not want it then; afterwards they got the \$1,100 as they required it."

Andrew Elliott, one of the mortgagees, said: "The \$1,100, balance of the \$1,600 after payment of the \$500, was to be got as we wanted it from Mr. Ostrander, but not all at once." In his cross-examination: "Fisher was to get money as he wanted it; it was understood that he could get it as he wanted it: something was said about two weeks." The balance was in fact paid as follows: February 9, \$300; 17th February, \$300; 14th March, \$90; 21st March, \$210; April 7th, \$20; April 28th, \$180. There was a further sum of \$400 paid to Fisher & Elliott.

A good many of the logs had been cut up, and a number of logs had been delivered to the mortgagors after the execution of the mortgage. Andrew Elliott, one of the mortgagors, stated that he dissolved partnership with Fisher some time in March: that some of the logs were sawed before he left: that he was there for about three weeks after the dissolution: he left about the beginning of April: the lumber from the logs so sawed, the clear lumber which the plaintiffs were to get, was taken up on the hill about twenty-five or thirty rods at the place called Gibraltar, and the common was piled in the yard; "that is, while I was there: some had been taken down to Lake Couchiching before I left: what was piled at Gibraltar was piled there for plaintiffs; when I left there was not

60,000 feet piled : then some common lumber was sold at the mill : all the lumber piled at Gibraltar was made out of some of the logs mentioned in the chattel mortgage : there were some logs brought into the mill yard after the mortgage, and some put in at the pond right at the mill : these were marked on the ends : they were got from different men : they were common logs, and no clear lumber of any account in them : no part of these were cut into lumber and piled for Beecher & Silliman : a quantity of lumber had been drawn to Washago. It was proved that a very considerable number of logs had been delivered after the mortgage, and that a number of these, along with a number of those mortgaged, had been sawn into lumber.

This action was brought to decide the question of the right of property in the following articles : the bailiff who made the seizure under the writ of attachment said : " The saw logs seized were 1000, and were seized at Fisher's mill. I seized also 160,000 feet of lumber, that was in different places : of this 30,000 feet was seized at Washago ; 2000 feet at Severn Bridge ; 60,000 feet at Gibraltar, in Township of Morris, about eight miles from Severn Bridge ; 70,000 feet at Fisher's mill,—making in all 162,000 feet."

At the close of the plaintiffs' case it was agreed that the learned Judge should submit three questions to the jury :—

1st. Were any, and if any, how many of the identical logs, which had been seized under the attachment, were included in the chattel mortgage ?

2nd. Were the 30,000 feet of lumber, or any, and if any, what part thereof, spoken of as delivered at Cozens, at Washago, delivered to, and accepted by Ostrander, as agent of the plaintiffs ?

3rd. Was Fisher in insolvent circumstances or not in May, 1870, when the verbal contract for 100,000 feet of common lumber was made, and was the contract an actual *bond fide* one, or for the purpose of giving Beecher & Silliman a preference over other creditors ?

To these the jury replied :

As to the first, that they could not say there were any.

As to the second, that plaintiffs did not accept the 30,000 feet.

As to the third, Fisher was insolvent, but the transaction was a *bonâ fide* contract of purchase of the 100,000 feet.

Upon this finding the learned Judge entered a verdict for defendant, with leave to the plaintiff to move.

In Michaelmas Term last, *Boys* obtained a rule *nisi* to enter a verdict for the plaintiffs, on the leave reserved at the trial, or for a new trial, on the law, evidence, weight of evidence, and the verdict being contrary to the Judge's charge, and perverse.

This Term *McCarthy* shewed cause, citing *Berkley v. Hardy*, 5 B. & C. 355; *Hebblewhite v. Morine*, 6 M. & W. 214, 215; *Robinson v. Paterson*, 18 U. C. 55.

Boys, contra, cited *Rose v. Scott*, 17 U. C. 385; *Robertson v. Strickland*, 28 U. C. 221; *White v. Brown*, 12 U. C. 477; *Mills v. King*, 14 C. P. 223.

GALT, J.—I propose, before treating of the other points of the case, to consider the question whether the transaction of the 24th January, 1870, can fairly be considered as a present advance at the date of the mortgage, or as an arrangement for future advances; because, if it is to be looked upon in the former light, the mortgage is, in my opinion, a valid security, so far as the statement of the agent in his affidavit is concerned; but if in the latter, then the mortgage is void, as it does not set forth the true agreement between the parties, as required by the Chattel Mortgage Act.

The position of the parties at the date of the transaction was, that the plaintiffs were dealers in lumber, and the mortgagors were in partnership as saw millers. The latter had a large number of saw logs, and in order to enable them to manufacture them, they applied to the plaintiff for a loan of \$1,600. The plaintiffs agreed to make this

advance, but they required security over the saw logs; at the same time, the agreement above referred to was executed. The money was not all advanced at the time of the execution of the mortgage, but was to be paid as the mortgagors required it, and I have stated that, in my opinion, if the money paid in this case is to be treated as a present advance (as I think it ought), the affidavit made by the plaintiffs agent is sufficient, and the security is valid: my reasons are based upon the marked distinction between the provisions of the 1st and 2nd sections and the 5th section of the Act. It appears to me that the Legislature considered, and with truth, that as long as the consideration was already due, or was paid at the date of the mortgage, there was no danger whatever of any fraud being committed on creditors, and therefore all that they required was that the affidavit should state that the mortgage was taken in good faith and for the express purpose of securing the repayment of the mortgage money. The Statute is silent as to any statement being made as to the mode of repayment: that was left to be settled between the parties themselves: all that the Legislature insisted on was that there should, at the date of the transaction, be a *bonâ fide* existing debt. It was, however, different in the case of future advances, and very naturally so. In the first place, let us consider the words of the Statute, and I think it will be seen that the provisions and requisitions of the 5th section apply only to cases where no present liability exists: "In case of an agreement in writing for *future* advances, for the purpose of enabling the borrower to enter into and carry on business with such advances, the time of repayment thereof not being longer than one year from the making of the agreement, and in case of a mortgage of goods and chattels, for securing the mortgagee repayment of such advances, and in case the mortgage is executed in good faith, and sets forth fully, by recital or otherwise, the terms, nature and effect of the agreement, and the amount of liability *intended to be* created, and in case such mortgage is accompanied by an affidavit of a

witness thereto of the due execution thereof, and by the affidavit of the mortgagee, or in case the agreement has been entered into and the mortgage taken by an agent duly authorized in writing to make such agreement and to take such mortgage, and if the agent is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent, such affidavit, whether of the mortgagee or his agent, stating that the mortgage truly sets forth the agreement entered into between the parties thereto, and truly states the extent of the liability *intended to be created* by such agreement and covered by such mortgage, &c., &c.”

It appears to me that from the very words of the Statute the liability contemplated by the act is a future liability. There is no word which can be construed as meaning a present existing liability, and bearing this in mind we can readily perceive the necessity, if fraud was to be prevented, of requiring the true nature of the transaction to be stated. If it had not been so there would have been no means whatever for a creditor to ascertain what was the nature of the claim intended to be secured, and, as there was no liability existing when the mortgage was given, there would have been the greatest latitude afforded for perpetrating frauds. This reason can have no applicability when the consideration is for a debt already due, or for a sum of money presently advanced: all that the Legislature has required in such cases is, that there should be an affidavit that the debt is justly due.

Let us apply the foregoing remarks to the case before us. We must in this, as in all other cases, be governed by the written evidence, unless that is impeached for fraud, which is not done here. There is the mortgage and the agreement. The mortgage is to secure the payment of \$1,600, either in money or in lumber, at the rates agreed upon. The agreement is, in consideration of the said sum of \$1,600, to deliver lumber at certain rates and within a certain time; but it will be seen from the very statement in the agreement itself, that the mortgage had been given

not for the purpose of securing the fulfilment of the agreement, but for the repayment of the money. Suppose that the mortgagors had delivered no lumber to the plaintiffs, but at the time of payment had paid the money and interest, and demanded a discharge of the mortgage, could the mortgagees have refused to accept payment, and have insisted on retaining the mortgage for non-fulfilment of the agreement? Surely not: all that they could have done would have been to bring an action for breach of contract.

If Ostrander's evidence is to be relied upon, and I see no reason to doubt the truth of it, the money was retained in his hands at the request of the borrower. It appears to me that this was extremely probable, as it would seem to be a very unnecessary risk for the borrowers to take a large sum of money into the woods for which they had no immediate necessity. The covenant contained in the mortgage, for the repayment of the money, must also not be overlooked. The covenant certainly treats the money as a present advance, because the agreement therein is, to repay the money, "with interest for the same from the date hereof, at seven per cent. per annum." This case is very different from *Robinson v. Paterson et al.* (18 U C. 55). There Robinson, C. J. says, "We confess there seems in Huff's own evidence great reason to suspect this; but, admitting his account to be true, there was nothing morally wrong intended, and the only question would be whether, since the Chattel Mortgage Act, a mortgage will be valid which is taken in a great part for a debt not yet actually existing, nor for advances which the mortgagee has not agreed in writing to make, but which he had merely talked of making and had not made when the mortgage was executed, nor, so far as we can find on the evidence, when the affidavit was made for registering the mortgage. I am therefore of opinion that this mortgage is not open to the objection taken, and that it should be held and taken to be a mortgage under the 1st section of the Chattel Mortgage Act, and not one under the 5th section.

An objection was taken to the authority of the agent, as not having been under seal. Mr. McCarthy referred to *Berkley v. Hardy* (5 B. & C. 355) and *Hibblewhite v. McMorine* (6 M. & W. 200), in support of it; but, on referring to those cases, I do not think that they support his contention, and as the statute requires only that the agent shall be authorized in writing, which was done in this case, I am of opinion that this objection fails.

The property mortgaged in this case was 2500 logs, and from the evidence it appeared that at the date of the mortgage there was not that number, but apparently about 2000 (see Elliott's and Canning's evidence.)

It is to be observed that nothing was said as to the lumber piled and seized at Gibraltar, at the Severn Bridge, or at Fisher's mill.

Assuming that my view of the mortgage transaction is correct, the plaintiffs had a good and valid title under it. It appears to me, from the report of the learned Judge, that the contention of counsel on both sides was as to the effect, not of the mortgage, but of the contract, and it seems to have been considered that to vest the property in the lumber (I am not at present referring to the logs) in the plaintiffs, it was necessary that it should have been delivered to, and accepted by them under the contract. This, in my judgment, was an error. If the mortgage was a valid mortgage, and passed the property in the logs therein mentioned to the plaintiffs, then, on the authority of *White et al v. Brown* (12 U. C. 477), the lumber manufactured therefrom was their property, entirely irrespective of the contract. I have already called attention to the fact that the contract is silent as to the logs from which the lumber to be delivered under it is to be manufactured. The logs were assigned as security, and the produce of them was the property of the plaintiffs and might have been claimed by them, whether they would have been obliged to receive the lumber from them under their contract or not. I fully concur in the judgment of my brother Gwynne as to the manner in which the verdict should be entered.

HAGARTY, C. J.—The first point to be determined is as to the validity of the mortgage. On its face it is simply a security for \$1600, acknowledged to be paid by mortgagees, and the property mortgaged is 2500 logs, containing by computation 600,000 feet of lumber. The proviso for redemption is on payment of the \$1600, at seven per cent., on or before 1st September, *or by delivering lumber of first and second classes, as agreed between the parties, to that value.*

The agreement, of equal date, declares that in consideration of \$1600 then paid and advanced to Fisher & Elliott by plaintiffs, "*which sum is collaterally secured to the parties by chattel mortgage, bearing even date herewith, on the saw logs now lying, &c., &c.,*" Fisher & Elliot agreed to deliver to plaintiffs all the first and second class lumber which they should make at their mill on or before the 1st October then next, at prices named, and plaintiff agreed to pay them at the rates specified, "*or, if the advance now made is not exhausted, to allow them for the lumber, &c., delivered, at rates aforesaid,*" Fisher & Elliot to use diligence in culling, making, and delivering, &c.

The \$1600 was advanced. I think, on Ostrander's evidence, we may assume that the sum he retained was simply to accommodate mortgagors, and that he held it (as it were) as their banker.

The affidavit is that the mortgagors are justly and truly indebted to the mortgagees in the sum of \$1600, and in usual form under 2nd section of the statute.

It is contended that the mortgage does not truly shew the real transaction between the parties.

It is clear that this mortgage does not come under the 5th section of the Act, not being for future advances agreed in writing to be made, or for endorsement of bills, &c., or any liability incurred by mortgagee for mortgagor, when the terms, nature, and effect of agreement, and amount of liability must be fully set out, and when the affidavit must also swear to the truth of the agreement set forth.

It is either a mortgage under the 1st and 2nd section of

the Act, or it is nothing. Its validity, of course, depends on its coming properly under the Act, and being duly registered. The good faith of this transaction, on the part of the mortgagees, is unquestionable, and should be supported, if possible, under the Statute. The difficulty chiefly urged is, that no *debt* was in fact created by the payment of this money; that it was really an advance to be repaid in lumber on the cotemporaneous contract, and that the affidavit is consequently not true. No other form of affidavit is provided by the 1st and 2nd sections for this class of mortgage. The case of *Baldwin v. Benjamin* (16 U. C. 52) bears upon this. It was a mortgage of chattels taken to secure plaintiff, who had become security for mortgagor to third persons, and had given the latter a mortgage on his own real estate, payable at certain periods: proviso, that mortgagor should pay mortgagee at fixed periods, or pay the third parties and indemnify him therefrom; and mortgagor covenanted to pay the moneys and indemnify plaintiff, and mortgage was registered on plaintiff's oath, that mortgagor was truly indebted to him in the whole sum named, &c., &c., just in the words of the Acts then in force, viz., 12 Vic. ch. 74, amended by 13 & 14 Vic. ch. 62, under which no other form of affidavit was allowed, and no provision as to advances or security, &c., as in sec. 5 of present Act. It was objected that the mortgage could not be made effectual by registration; that the affidavit required by the Act, and made, could not be properly made. Sir J. Robinson, C. J., said the objection could not prevail; that it was repugnant to reason to hold that a chattel mortgage is within the Act, so as to make registration indispensable to its validity, and yet that it is a mortgage of such a kind that the affidavit, positively required by the Statute to be made for registration, cannot be properly made or legally received for the purposes of registration. *Lex non cogit ad impossibilia*; and if this be really a mortgage which cannot be registered according to the directions of the Statute, it should follow that, if it be otherwise legal, it cannot be held invalid for

want of registration. But I do not consider there is any real difficulty. All Statutes for prevention of fraud are to be construed liberally. The object of the Act was to guard against pretended incumbrances, not to render impossible any transactions untainted with fraud, &c. We must either look upon this mortgage, which is one of an ordinary character, where a counter security is required to be taken, as being of a description not within the Statute, and therefore not necessary to be registered, or we must uphold the registry of it, which has been made upon such an affidavit as the Statute requires; and taking it either way, the transaction, which is a perfectly fair one, must be upheld."

This case seems much stronger for the mortgagees. If the affidavit could be made in the case cited, where no money whatever had been advanced or paid, it could certainly be made in the case before us. As this mortgage must, as already noticed, fall wholly within the 1st and 2nd clauses, the law applicable to both cases is the same; and, as Sir. J. Robinson proceeds to say, "here all is done that the Statute requires, and we could not, therefore, hold it void for non-registry, for it has been registered upon such affidavit as the law requires."

Valentine v. Smith (9 C.P. 59) approves of, and follows the law of *Baldwin v. Benjamin*, in a case governed by the same Statutes and on a similar affidavit of mortgagee, that mortgagor was actually indebted, &c., when the mortgage was to secure endorsements and future advances. Draper C. J., says: "The mortgagee has used the very words of the Act in his affidavit, though adding others (perhaps unnecessarily) to explain that the consideration, as expressed in the mortgage, was the true existing consideration, and that the transaction was in good faith and without fraud, as the jury has in fact found it to be." *Squair v. Fortune* (18 U. C. 547), which was under the 20th Vic. ch. 3, similar to the existing law, shews also the latitude sanctioned by the Court as to the affidavit. *Boulton v. Smith* (17 U. C. 400), confirmed on appeal (18 U. C. 458), turned

on the insufficiency of the mortgage (which was under the new Act, equivalent to our 5th section), in not fully shewing the terms, nature and effect of the liability incurred by endorsing.

I therefore think that the chattel mortgage can be upheld against the objection. I see no objection to the mortgage on the face of it; and the affidavit literally complies with the Statute, as in *Baldwin v. Benjamin*. The confusion is created by treating it as a mortgage, under the 5th section, for advances, and applying to it and the affidavit the requirements of that section, which seem quite inapplicable to the present transaction.

GWYNNE, J.—I concur in thinking, upon the authority of *Baldwin v. Benjamin* (16 U. C. 52), which is approved of by this Court in *Valentine v. Smith* (9 C. P. 59), that the objections taken to the validity of the mortgage, and which, at the trial, I thought to be formidable, cannot prevail. The *bona fides* of the transaction was unimpeached, and it cannot be doubted that the mortgage would have been perfectly good, independently of the statute; and it does certainly seem to follow that a mortgage which would have been good, but for the statute, cannot be avoided by the statute, when the conditions required for its validity by the statute are complied with. The objection, when critically considered, is, that the party making the affidavit could not conscientiously make, and therefore ought not to have made, the affidavit, that the mortgagor was indebted to the mortgagees. Having made the affidavit required by the statute, the provisions of the statute are complied with; but, upon a careful consideration of the case, I have come to the conclusion that in truth the transaction was such as to acquit the conscience of the deponent, and to justify his making the affidavit; for, taking the whole contract together, it was an advance made by the mortgagees upon a contract to be repaid in money, unless the mortgagors should avail themselves of a privilege granted to them to repay it in lumber of certain qualities at certain agreed prices.

The plaintiffs, therefore, are entitled to a verdict. But the question remains, to what extent? The plaintiffs' counsel at the trial did not claim to follow under the mortgage the lumber made from the mortgaged logs. They claimed rather the logs which were attached as their logs, and the lumber they claimed under the contract. As the case is reserved, however, we are at liberty to draw inferences as a jury should from the evidence, and to render such a verdict as we think a jury should under the circumstances.

I think the proper conclusion to draw as to the logs is that drawn by the jury, namely, that the logs attached in June, 1000 in number, were logs which had been brought in after the execution of the mortgage; and that those which had been included in the mortgage were sawed. If we could clearly distinguish the lumber of all classes cut out of 2000 logs, that number being, as I think, the utmost which were on the premises when the mortgage was executed, although 2500 is the number stated in the mortgage, we could follow that lumber; but there appear to have been sawn into lumber a few hundred logs over the 2000 logs. There is, however, evidence from which we may not unfairly conclude that these logs produced only inferior lumber. There is positive evidence of Elliott, that up to the time he left, *all* the lumber piled at Gibraltar was made out of logs included in the mortgage. I think we may fairly conclude that what was piled in the same place after Elliott left, came from similar logs; in fact, I think we may fairly conclude that the 60,000 feet at Gibraltar, and the 30,000 feet at Washago came from logs included in the mortgage. The evidence does not enable me to attribute the 2000 feet seized at the Severn Bridge to any particular logs; but of the 70,000 feet seized at the mill, of common lumber, there can be no doubt that some portion of it also came from the mortgaged logs; but there seems to be no means left for determining what quantity.

We are of opinion that the balance of the 83,517 feet of common stuff, marked by Dillon, after deducting the 38,000

or 40,000 feet delivered under the verbal contract for 100,000 feet made in May, having been all a portion of what was marked by Dillon, after Fisher had absconded, cannot be recovered under the contract.

Upon the whole, therefore, we are of opinion, that the plaintiffs' verdict should be for the 60,000 and 30,000 feet seized at Gibraltar and Washago. To this we think them fairly entitled under the mortgage; but we do not feel that we can, with any degree of certainty, attribute any other portion of the lumber seized, to the logs mortgaged.

Judgment accordingly.

CLARKE V. BATES.

Trover for mortgaged chattels—Removal by stranger—Copy of mortgage not filed within two months—C. S. U. C.ch. 45, sec. 9—Advance to mortgagor—Validity of mortgage.

Goods covered by chattel mortgage were removed from the County, either on an alleged sale by mortgagor, or against his will, or stolen from him, and were sold in another County to the defendant, mortgagor being, at all events, no party to the removal. Just over two months from removal, mortgagee, on hearing where they were, went and demanded them from defendant :

Held, that such a removal was not within the statute, requiring a copy to be filed within two months of the permanent removal of the goods from the County.

The mortgagor had agreed to deliver lumber to plaintiff, at specified prices, up to September, 1870, which plaintiff was only bound to pay for as delivered, and not to make advances; but at the date of the mortgage plaintiff had advanced about \$250 beyond the value of the lumber delivered, and to assist him still further he advanced \$450 more, on his agreeing to execute the mortgage to secure both amounts, which were to be repaid by lumber or money in two months, the security covering the goods in dispute as well as the lumber :

Held, that the mortgage was an independent contract, an advance of money to be repaid at an earlier date than that named for the delivery of the lumber, that it was not invalid, as not shewing the true dealing between the parties, and that the affidavit, which was in the common form, was sufficient, and that it would also be sufficient under *Beecher v. Austin*, *ante* 334.

TROVER for a pair of horses and harness.

Pleas, not guilty, and traverse of property.

At the trial, at Barrie, before Gwynne, J., without a jury, a chattel mortgage was proved, dated 6th April, 1870,

made by Joseph Walker to plaintiff, consideration \$700, covering two horses (described), two sets double harness, trucks and waggon, cow, one set silver-mounted harness, and 400 pine logs, marked "J. B. S.," and 60,000 feet white pine lumber, same marks, being at or near the mill on lot 1, 7th concession, Oro, and 100 pine logs on the east half of lot 1, 4th concession, Medonte, marked, or to be marked, with same letters. There was a proviso for redemption on paying \$700 in two months from date, with interest at 10 per cent., and power to mortgagee to take possession on default, or in case of any attempt to sell or dispose of any of the goods, or remove them from the county of Simcoe. The affidavit of the mortgagee was in the common form as for a debt due, that mortgage was to secure payment, and not to protect goods against creditors, &c. There was endorsed a certificate that the copy was filed 7th August, 1870, in the county of Bruce.

The plaintiff was examined. It appeared that an agreement was made between plaintiff and Walker, dated 1st February, 1870, by which Walker agreed to deliver at Allandale station all the clear lumber he could make at his saw-mill in Oro at \$20 per M., setting out qualities and prices, and to deliver at Orillia all the clear he did not deliver at Allandale, the lumber to be delivered on or before 1st September, 1870. This was the beginning of their dealings. Plaintiff produced an account current up to 8th April, shewing balance due by Walker (crediting him with lumber and charging cash advanced) \$251.84; that on 16th April plaintiff gave him \$448.16, making up \$700, and took the mortgage for that sum; that this was an advance made to him, to be repaid in lumber, and that he never delivered any more lumber; that he had the privilege of paying both the sums in lumber, of the qualities mentioned in the agreement, up to 1st September, and the chattel mortgage was taken as a security for these sums in case he should not deliver the lumber; that he wanted the money in advance to pay his hands and to pay for pine to make into lumber; that he made up and

sold (but not to plaintiff) the stock he had of logs; that Walker offered him the mortgage, as he had refused to advance him any more money without security.

It appeared that plaintiff had a prior mortgage on the same team, on 3rd February, 1870; it was for \$400, payable in two months. This he could also pay in lumber. Plaintiff said if Walker did not pay in lumber he was to pay in cash, that is, in reference to the \$700.

It was proved that about 12th or 13th May the horses were taken from the county of Simcoe by one McDuff, who was Walker's foreman, and claimed them as given to him for his wages. Walker himself absconded. They were taken, with the harness, to Paisley, and sold to defendant. On 15th July plaintiff received a telegram about the horses, and went up and saw them in defendant's barn. Defendant refused at first to let him see them, but afterwards let him see them on his promising not to put his hand on them, saying if he touched them the property in them would become plaintiff's. He also said he had the harness with the team. Plaintiff demanded it, but defendant said he could not have it. It seemed that Walker telegraphed to plaintiff that he had found the horses up in Bruce; plaintiff went up, and Walker accompanied him to defendant's to look at them.

It was objected, 1, that no sufficient demand or refusal was proved; 2, that the mortgage did not express the true contract; that the \$700 was an advance upon the lumber contract, which did not appear in the mortgage; 3, that as the property was removed to the county of Bruce, the mortgage should be registered there under the 9th section of the Act, and it was not recorded till August, after the sale and action brought; that the certificate sent to Bruce was not under the seal of the Court, and did not certify the affidavits.

On the defence, McDuff was called, and proved his sale of the horses and harness to defendant, with a buggy, for \$220; that he took them, for his wages, out of Simcoe on the 12th or 13th May, with no intention of returning.

He took the horses into the county of Grey, also to Wellington, and finally to Bruce.

The learned Judge found a verdict for plaintiff for \$330. Defendant had leave to move to enter a verdict for him on the points raised, and the evidence, or to reduce the verdict by striking out the value of the harness, if the Court thought it not sufficiently identified.

In Michaelmas Term last, *McCarthy* obtained a rule *nisi*, on the leave reserved, or for a nonsuit, or to reduce the damages, or for a new trial, for excessive damages.

J. Ardagh shewed cause. He cited *Hilbery v. Hatton*, 2 H. & C. 822; *Moffatt v. Coulson*, 19 U. C. R. 341; *Edwards v. Kerr*, 13 C. P. 24; *Courtiss v. Webb*, 25 U. C. R. 576.

McCarthy, contra.

HAGARTY, C. J., delivered the judgment of the Court.

We see nothing in the point as to the demand and refusal. There was quite sufficient evidence to warrant a finding that plaintiff had demanded, and defendant refused, possession of the goods, and as to the harness there was quite sufficient evidence. As to the filing the mortgage in Bruce, sec. 9 of U. C. Consol. Stat. ch. 45, enacts that in the event of the permanent removal of goods and chattels, mortgaged as aforesaid, from the county in which they were at the time of the execution of the mortgage to another county, &c., a certified copy, &c., &c., shall be filed in the county to which they are removed within two months from such removal, otherwise the chattels shall be liable to sale under execution, and the mortgage shall be void against subsequent purchasers for value. We are of opinion that this clause does not avoid the present security. If defendant's construction be correct, then goods, stolen from the possession of the mortgagor, carried away from the county, and concealed for over two months, will come within the provision of the clause.

In this case there is very strong ground for suspecting

that the horses and harness were taken away by McDuff without Walker's knowledge or assent. The latter asserted afterwards that they were stolen from him, and telegraphed to mortgagee, from Bruce, telling him of the removal. There is nothing to shew that Walker was a party to taking them out of the county. The intention of the Statute was doubtless to protect purchasers in the county to which they might be removed, and for that purpose directed a registration there, allowing two months from the time of removal. The mischief could, of course, be done within the two months. In the case before us, the sale to defendant was barely outside that period. I cannot but think that the "permanent removal" in the Statute must mean a removal by the mortgagor in the ordinary way, or under a mortgage like the present, which enables the mortgagee to take possession in the event of a removal without his written consent, when the goods are removed with such consent. We are not prepared to say that if the goods were removed from the county, in the ordinary way, by the mortgagor, that the Statute cannot apply, so long as the mortgagee is ignorant of the removal. "Permanent removal" does not point to a transaction like that before us, whether we believe that McDuff took them improperly without Walker's assent, or whether they were given to him, as he swears, to pay his wages. The subsequent part of the section points clearly to a removal by the mortgagor, as, if not registered within two months, they may be taken in execution. This must mean execution against mortgagor, and the mortgage shall be void against subsequent purchasers or mortgagees for value. This, we think, must mean purchasers or mortgagees from the mortgagor, to whom the latter might sell or mortgage in the county to which they are removed.

We think the objection fails.

The most serious point is, that the mortgage does not, as is alleged, shew the true contract between the parties. As I understand the facts, Walker had contracted to deliver lumber to plaintiff, at specified prices, up to 1st

September, 1870. Plaintiff was not bound to make advances, or to do more than pay for lumber as delivered. Now, on the 16th April, when the mortgage was made, plaintiff was in advance to him about \$250 over and above the price of the lumber delivered. To help him further he advanced \$450 more to him, and it was only on Walker offering this security that plaintiff would make the advance. This was to be repaid by money, or lumber, in two months. The security was not merely on saw logs and lumber, but on these horses and other cattle. It seems to me that plaintiff had a right to treat this as a money claim, and the mortgage as a security for the money so advanced. Had an action been brought on the covenant to pay, it would no doubt have been a good defence to plead delivery of lumber, at an agreed price, in accord and satisfaction. Still, we think it was a debt recoverable at the end of the two months, not depending on the fulfilment of the written agreement, by which Walker had till September to fulfil the contract. The existence of that contract would be no bar to a recovery of the whole amount of \$700 secured in the mortgage, unless, as already noticed, lumber had been delivered in the meantime. Plaintiff had no other remedy to recover his \$700 in two months except the mortgage. Walker need not deliver, and in fact did not deliver, any lumber within the two months.

We are of opinion that the mortgage was an independent contract, an advance of money to be repaid at an earlier date than provided for the delivery of the lumber, and that it is not invalid, as not shewing the true dealing between the parties, and the affidavit of mortgagee rightly stated the transaction.

The case of *Arnold v. Robertson* (8 C. P. 147) contains a full discussion as to the necessity of the mortgage filed shewing the full and not merely the partial nature of the transaction between the parties.

In *Beecher v. Austin*,* decided this term, we have held

Ante, page 334.

that such a mortgage as this is under the 1st and 2nd sections of the Act, and that the affidavit there provided, and here used, was sufficient.

We see no ground for interfering with the amount of the damages.

Rule discharged.

REGINA V. WHITE.

Conviction for selling liquor on Sunday—32 Vic. ch. 32, sec. 23 (Ord.)—Omission to negative requisition for medicinal purposes—Qualification of magistrate—Evidence.

A conviction for selling liquor on a Sunday, in contravention of 32 Vic. ch. 32, sec. 23 (Ord.), omitted to state that the liquor was not supplied upon a requisition for medicinal purposes: *Held*, bad, and the conviction was quashed.

The only evidence offered in proof of the magistrate, before whom the recognizance in this case had been taken, not being properly qualified, was a certificate, purporting to be under the hand and seal of the Clerk of the Peace, that he did not find in his office any qualification filed by the magistrate: *Held*, insufficient.

C. S. Patterson, obtained a rule *nisi* to quash a conviction, made upon the 4th day of January, 1871, by the police magistrate of the City of Toronto, for, among other grounds taken, "That it does not appear that the liquor was not supplied upon a requisition for medicinal purposes."

The conviction was in these words: "For that he the said George White, then being a licensed tavern keeper in and for the said City of Toronto, did on the 11th day of December, 1870, the said day being Sunday, in his house and premises situate on King Street west, within the limits of the said City of Toronto, and licensed under the provisions of 'The Shop and Tavern License Act, 1868,' and in the premises licensed and specified in and by such license, unlawfully and knowingly sold to one Henry Reeve a certain quantity of wine, beer, and other spirituous and fermented liquors, to wit, one glass-full of brandy mixed with soda water, contrary to the form of the Statute in such case made and provided, this being adjudged to be his first offence against the provisions of the said Act,

and George Albert Mason being the informant in the premises."

Morgan shewed cause, citing *In re Barrett*, 28 U. C. 559.

Patterson (*Green*, with him), contra, cited *Rex v. Stone*, 1 Ea. 639; *Paley on Convictions*, 173; *Regina v. Boyes*, 4 Pr. Rs. 195; *Rex v. Jenkins*, 1 T. R. 82.

GALT, J.—The clause of the Act under which this conviction was made is the 23rd sec. of Ont. Stat. ch. 32 of 32 Vic., which is as follows: "In all cases when by the laws of the Province of Ontario intoxicating liquors are or may be allowed to be sold by wholesale or retail, no sale or other disposal of the said liquors shall take place therein or on the premises thereof, or out of or from the same, to any person or persons whomsoever, from or after the hours of seven of the clock on Saturday night till the hour of six of the clock on Monday morning thereafter, and during any further time on the said days, and any hours on other days during which, by any by-law of the Municipality wherein such place or places may be situated, the same, or the bar-room or bar-rooms thereof, ought to be kept closed, save and except in cases where a requisition for medicinal purposes, signed by a licensed medical practitioner, or by a justice of the peace, is produced by the vendee or his agent; nor shall any such liquor be permitted or allowed to be drunk in any such places, except as aforesaid, during the time prohibited by this Act for the sale of the same."

It is stated in *Paley on Convictions*, p. 232, that when the enacting clause of a Statute constitutes an act to be an offence under certain circumstances and not under others, then, as the act is an offence only *sub modo*, the particular exceptions must be expressly specified and negatived; but, when a Statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso or exception in favour of particular cases, or in the same clause, but not in the enacting part of it, by words of reference and otherwise, then the proviso is matter of defence or excuse which

need not be noticed in the information or conviction. See also *Van Boven's* case (9 Q. B. 669), *Thibault v. Gibson* (12 M. & W. 88). In the clause of the Statute under which this conviction took place, there is an express exception, "save and except in cases where a requisition for medicinal purposes" is produced by the vendee. In my opinion this exception ought to have been negatived in the conviction. In the *King v. Jukes* (8 T. R. 542) Lord Kenyon says, "This is not an objection of form but of substance, and the reason is well given by Hawkins why a conviction should negative all the exceptions in the enacting clause, because the party cannot plead to such a conviction, and can have no remedy against it, but from an exception to some defect appearing on the face of it; and all the proceedings are in a summary manner. Therefore the conviction itself should shew that the party accused had not the defence which the Act gives to him, if true."

HAGARTY, C. J.—I agree with the result of the judgment just delivered.

The offence is wholly created by the statute, and may be described as a selling of liquor on Sunday in any case, except in cases where a requisition for medicinal purposes is produced. To commit a man for selling on a Sunday, may be no offence whatever under the Act. The omission to negative the existence of the requisition for medicinal purposes, seems clearly fatal on all the authorities.

I at first thought that the statutable form given in the general Act, referred to in sec. 25, might help, or something in the Act itself (Con. Stat. C., ch. 103).

Sec. 44 enacts: "If the information or complaint negative any exemption, exception, proviso, or condition in the statute, on which the same is framed, it shall not be necessary for prosecutor or complainant to prove such negative; but defendant may prove the affirmative thereof in his defence," &c. But nothing is said as to the conviction.

The form of conviction allowed to be used contains the directions in the blank, "stating the offence, and the time

and place when and where committed." See also the Act of 1869, ch. 31. This leaves the statement of the offence just where it was.

The same provision as to regulating exemptions appears in the Act of 1869, ch. 31, sec. 44.

Great latitude is allowed for variances between the information and the evidence; and sec. 24 of the Act of 1869, ch. 31, allows information in many cases, "without oath or affirmation as to the truth thereof."

But we cannot refrain from expressing great surprise at the proceedings in this case.

One G. A. Mason lodges a sworn information against defendant for selling liquor on Sunday without a license. The charge and conviction are shewn to be untrue; for on the same information a conviction is made of a totally different offence, viz., having a license and selling liquor on Sunday.

It can hardly increase public confidence in the administration of justice, if an informer, who swears a man is doing an act without a license, when the fact of his having a license was so readily ascertainable, be allowed, on the same information, to share a penalty imposed on the defendant for doing an act made penal on the express grounds of his having a license. I do not think it necessary, in the view we take, to discuss the question as to the cumulative penalties on second and third convictions. It would be only reasonable to suppose that the leading idea of this increased punishment was, that if a person be once convicted of an offence, his repetition thereof, after experiencing the power of the law, should justly ensure to him a more severe penalty.

Lodging on the same day information for distinct offences, committed on previous distinct days, and then adjudicating on the second and third offences as being offences committed after previous convictions, all three convictions being made on the same day, and probably at the same time, may possibly be within the letter of the law (as to which we express no opinion), but can hardly

be within its spirit, and not likely to answer the purpose of warning and correction, which we think the Legislature intended.

An objection was taken by Mr. Morgan, that the recognizance was insufficiently taken before an unqualified Magistrate. If this objection be open to him, he has offered no legal proof thereof. He has simply filed a certificate, purporting to be under the hand and seal of the Clerk of the Peace, that he does not find in his office that any oath of qualification has been filed by "Nathaniel Dickey." The recognizance appears to be taken before, and is signed by "N. Dickey, J. P."

Even if this novel method of proving the matter desired to be brought before us be correct, we have no means of knowing that the certificate in any way refers to the same person whose name is attached to the recognizance.

GWYNNE, J., concurred.

Conviction quashed.

MCARTHUR V. WEBB ET AL.

Husband and wife—Deed of separation—Provision for children—Reconciliation—Non-avoidance of deed—Release of dower, after subsequent separation, at husband's instance—Revival of deed.

A deed of separation between husband and wife, where the estate is conveyed to the wife for life, with remainder to the children of the marriage on her death, is not avoided by the subsequent reconciliation of the parties, as the interests of the children intervene to preserve the deed.

Semble, that where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, and she does so, after reconciliation and subsequent separation, at his instance, the deed is thereby revived.

This was an ejectment tried before the Chief Justice of Ontario, at the County of York Assizes, in November last.

The title of the plaintiff to the premises was admitted, but the defendants claimed title under a deed from him to them, dated 16th November, 1864.

This deed was made to the defendants, as trustees for the plaintiff's wife and children, and recited, among other things, that the plaintiff and his wife had agreed thenceforth to live separate and apart from each other during the remainder of their joint lives. The conveyance was for the support of the wife during her life, and for the maintenance and support of the children; and in trust, after the death of the wife, to convey the land therein mentioned to the children. The deed contained, also, a recital that, in consideration of the conveyance, the wife should, at any time, when requested by the said James McArthur, release and bar her dower in a certain lot therein mentioned, and should support and maintain the children free from any expense to the said James McArthur. There was a proviso in the deed that the property, real and personal, therein conveyed to the Trustees, should be liable to indemnify the plaintiff against all debts that might be contracted by the wife; and then followed a covenant from the trustees that they would well and sufficiently indemnify and save harmless the plaintiff against such debts and sums of money which the said wife should, at any time or times while she should live separate and apart from the plaintiff, contract or owe to any person or persons whomsoever, whether for her own support or maintenance, or for the support or maintenance of the children; and also that the wife should, when requested, bar her dower in a certain lot therein mentioned, and that after the death of the wife they would convey the property to the children. The last clause was, "And it is hereby expressly declared that the said James McArthur shall not, nor shall any person claiming under him, have any further power, right, title, or interest, over, in, or upon, or to the said lands, &c., &c., but that the same shall go to the wife for life, and to the children in fee."

It was proved at the trial, and so found by the jury, that after the execution of the deed the plaintiff and his wife had cohabited as man and wife. It also appeared that such cohabitation existed for some months only, namely, from

January to June, 1865, and that the parties had ever after lived separate. It was also in evidence that on the 19th May, 1866, (after the final separation of the parties) the plaintiff sold the land mentioned in the deed of separation, to which the wife had agreed to bar her dower, and that by a deed bearing date the 6th day of August, 1868, made between the wife, of the first part, the plaintiff, of the second part, and one John Allen, the purchaser of the said land, of the third part, the wife released her dower in the land in accordance with the provisions of the separation deed. This release (to which plaintiff was a party) contained the following recital: "And whereas, under the provisions of a certain settlement, made between the parties hereto, of the first and second parts, it was agreed that the party of the first part should release and discharge the hereinafter described land, of and from her dower; and whereas she has now agreed to execute a release of her dower in the hereinafter mentioned land, in pursuance of said agreement," &c., &c.

The learned Chief Justice told the jury that if they were satisfied that the parties cohabited as man and wife, they must find for the plaintiff, which they did.

In Michaelmas Term, *McMichael* obtained a rule to set aside the verdict, and enter it for defendants; or to enter a nonsuit on the leave reserved; or for a new trial on the law and evidence; and for misdirection, as the learned Judge should have told the jury that the deed made by plaintiff, even if it were voidable, was not void, and therefore plaintiff could not recover; that it was in trust for other parties besides the plaintiff's wife, whose rights could not be affected by her conduct, and that the trusts for which it was made, and the consideration expressed in it, were not, that it could be declared void, and that the decree in the Court of Chancery was evidence conclusive against the plaintiff.

McCarthy now shewed cause. He referred to the report of the case in 13 Grant. 303, and also cited *Bright's Hus-*

band and Wife, II. 319, 320; *Scholey v. Goodman*, 1 C. & P. 36; *Vansittart v. Vansittart*, 2 DeG. & J. 249.

McMichael, contra, cited *Durant v. Tilley*, 7 Pr. 385; *Jodrell v. Jodrell*, 14 Beav. 377; *Sandars v. Podrey*, 16 Bear. 207; *Wilson v. Wilson*, 14 Si. 405; *Guth v. Guth*, 3 B. Ch. Ca. 614; *Frampton v. Frampton*, 4 Beav. 287; *Hulme v. Chitty*, 9 Beav. 437; *Webster v. Webster*, 3 Jur. N. S. 655; *Randel v. Gould*, 8 E. & B. 457.

GALT, J., delivered the judgment of the Court.

It is very well established that, if a deed is made in contemplation of a future separation, such deed is void, as being contrary to public policy. It is equally well settled that a deed securing a provision for the wife and children, on an immediate separation, is valid. It was, however, contended on the part of the plaintiff, that if, in the latter case, the parties ever cohabit again together, that the deed becomes null and void, and that the estate, if any has been conveyed, is at once divested from the trustee, if one has been appointed, and revested in the grantor.

The deed now before us was made not only on a good, but a valuable consideration. There is a covenant, on the part of the trustees, to indemnify the husband from the debts of the wife, and also that the wife shall and will, at the request of the husband, release her dower in certain other lands; and also the wife withdraw her suit for alimony, and the interim decree under it, in her favour. She did, long after the cohabitation relied upon for vacating the original deed had ceased, bar her dower, and the very terms of the release shew that it was executed in pursuance of the covenant therein contained, and that the plaintiff relied upon the provisions of the deed, which he now asserts was vacated in January, 1865. This circumstance alone would distinguish this case from any of those relied upon by the plaintiff; but, independent of this very important fact, I am of opinion, on the authority of *Randle v. Gould* (8 El. & B. 456), in which all the cases bearing on this subject are considered, that the deed now before us is a

good and valid deed. In that case there was an express proviso that the deed should be valid, even if cohabitation took place, unless under certain conditions. There was a cohabitation, but the conditions were not complied with. It is to be remarked that in that case the question arose on an equitable plea. Lord Campbell, in giving the judgment of the Court against the defendant, says: "The equitable defence relied upon to this action for arrears of the weekly allowance is, that before the arrears accrued the husband and wife, without any writing under their hands, for a short time cohabited together. This cohabitation clearly does not avoid the deed under the express proviso. The question then arises whether a deed so framed is impliedly avoided by such cohabitation, &c., &c. But if there had been no express proviso for avoiding the deed in a certain manner, we are of opinion that, looking to the whole scope of this deed, the covenant to pay the weekly allowance would not have been avoided by the reconciliation and cohabitation of the husband and wife. It is not merely an allowance to her while she lives separate from her husband, it was absolutely to pay to her, by way of a provision, during the term of her natural life, not being suspended or reviving as she should live with him or leave him. It is therefore a post-nuptial settlement upon her by her husband, holding out no temptation to her to separate from him, and is as little liable to exception as a covenant to pay pin-money in a regular marriage settlement. *Jee v. Thurlow* (2 B. & C. 547); *Wilson v. Musckett* (3 B. & Ad. 743), and *Webster v. Webster* (4 DeG. M. & G. 437), are express authorities in support of the view we have taken of this case."

The case now before us is much stronger in favour of the defendants than that above cited. The deed has been acted upon since the cohabitation ceased. There are the rights of the children involved; and we can find no case in which rights of third parties have been set aside, as is sought to be done here. There is, further, in the deed itself, an express declaration that the land shall go to the

wife for life and to the children in fee, and that the plaintiff shall not and will not claim any further power, right, title, or interest, in, or upon, or to the said lands.

When the parties were before the Court of Chancery, as reported in 13 Grant, all that the late Chancellor decided was, that he would not interfere to set aside this deed, leaving the plaintiff to try his right in a Court of Law. We are of opinion that he has no right, and that this rule should be made absolute.

Rule absolute.

CAMPBELL ET AL. V. LEPAN ET AL.

Sale and delivery of goods—Receiver—Wrongful removal by—Replevin.

Plaintiffs contracted with V., who was at the time in partnership with L., for the sale and delivery to them of a quantity of timber. Subsequently L. obtained a decree in Chancery against V., which, after declaring them to have been parties in getting out the timber, directing an account, and restraining V. from removing or intermeddling with the timber, referred the suit to the Master to appoint a Receiver. Before this decree was acted upon by L., V. delivered the timber, as the jury found, to the plaintiffs, by whom, as they also found, it was accepted without objection on L.'s part, who in fact was present at the time. Some months after this a Receiver was appointed under the decree in Chancery, and, at L.'s instance, he took possession of the timber in question:

Held, that the Receiver's act was wrongful, as the property in the timber had passed to plaintiffs before his appointment, and that they could therefore maintain replevin against him and L. for it.

REPLEVIN for twenty-eight pieces of timber.

The defendants pleaded that the said goods were the goods of the defendant Lepad and of one Vanderbeck, who were co-partners, and not the goods of the plaintiffs, as alleged, and that the defendant Lepad, as owner of the said goods, and the said Armour, as Receiver of the goods of the firm of Lepad & Vanderbeck, appointed by the Court of Chancery, took and retained the said goods as in the declaration alleged.

Issue.

At the trial, before Wilson, J., at Sandwich, in November, 1870, it appeared that for some years one Vanderbeck had

entered into contracts with the plaintiffs for the getting out, and delivery to, and for them, of timber cut in the woods round Sandwich. In entering into these contracts the plaintiffs dealt with Vanderbeck alone, ignorant, in so far at least as it appeared, of his being in partnership with Lepad in the transactions.

Under the contract in question the plaintiffs advanced to Vanderbeck large sums of money, which enabled him to get the timber cut. In the winter the plaintiffs sent their agent to the woods, where the timber was cut, for the purpose of being marked as the plaintiffs', and he accordingly marked what was then cut with plaintiffs' mark, "C. O." A large portion of the timber so cut for the plaintiffs was delivered to them by Vanderbeck; but in June, 1868, the plaintiffs being then in advance to Vanderbeck to the full contract price, it was agreed that he should make delivery to them in Canada of timber brought down under the contract, and lying on the Detroit river on the Canada side. Accordingly the plaintiffs sent their agent over to receive delivery and to mark it for the plaintiffs. A portion of the timber, which had already been marked for the plaintiffs in the woods in the winter, was again re-marked, and the residue was marked as the plaintiffs, all at a place, called Askin's Yard, on the bank of the river, and the plaintiffs assumed to pay and paid the rent for the yard, and drew the timber as they required it. On the 27th April, 1868, a decree had been made in a suit in Chancery, wherein Lepad was plaintiff and Vanderbeck was defendant declaring, Vanderbeck and Lepad to have been partners in getting out this timber and in other matters, and for an account of partnership transactions. The decree ordered that the defendant Vanderbeck be restrained from removing or intermeddling with the timber belonging to the co-partnership, and it was thereby referred to the Master to appoint a fit and proper person to be Receiver of the partnership assets and effects. While the plaintiffs were removing the timber, delivery of which had been made to them in June, and on the 8th September, 1868, the Master, to whom the cause of

Lepan v. Vanderbeck was referred, appointed the defendant, Armour, Receiver in the said cause in Chancery, and Lepan procured him to take possession of such of the timber as the plaintiffs had not removed to the other side of the river. Armour accordingly took the twenty-eight pieces in question out of Askin's Yard where they were, and removed them to Windsor where the plaintiffs replevied them.

The question at the trial was, whether or not the defendant Lepan did in fact so interfere to prevent the delivery by Vanderbeck in June as to deprive his acts, admitting him to be a co-partner with Lepan, of validity in passing the property to the plaintiffs.

The learned Judge left it to the jury to say:—1st. Did Vanderbeck make a delivery of the timber to plaintiffs in June, and did plaintiffs actually accept such delivery? In reply to which the jury answered "Yes." 2nd. Did Lepan forbid Vanderbeck from delivering the timber? In reply to which the same answer was given. 3rd. Did Lepan forbid the plaintiffs from accepting the delivery of the timber? In reply to which the jury answered "No." And 4th. Did Lepan and Armour take possession of the timber under the decree and receivership? In reply to which they answered "Yes."

Upon this finding the learned Judge recorded the verdict for the defendants, with leave to the plaintiffs to move to set it aside, and to enter the verdict for them, with \$4 damages.

Accordingly, in Michaelmas Term last, *Osler* obtained a rule *nisi* pursuant to the leave reserved, to which, this term, *C. Robinson*, Q. C., shewed cause, and which *Moss* supported, citing *Ward v. Smith*, 6 Hare, 312; *Evelyn v. Lewis*, 3 Hare, 472; *Eyton v. Denbigh, &c.*, R. Co., L. R. 6 Eq. 14.

GWYNNE, J., delivered the judgment of the Court.

For the reasons given when this case was before us upon demurrer (19 C. P. 31), and upon the authority also of

Evelyn v. Lewis (3 Hare, 475), cited by Mr. Moss, we are of opinion that if the delivery of the timber to the plaintiffs in June, 1868, was sufficient to pass the property therein to them, the appointment of the Receiver in September following left the property and possession of the timber just as it was before such appointment, and that the act of the Receiver, in taking the timber from Askin's Yard, where it was kept by the plaintiffs, was a wrongful act. The delivery of the timber by Vanderbeck to the plaintiffs, and its acceptance by them through their agent Oates, who marked it with the defendants' mark, appears to have taken place in the presence of Lepan, and the jury have found that an actual delivery of the timber was made to the plaintiffs, and that Lepan did not forbid them from accepting delivery of it. By the decree, which was produced, it appears that Lepan had in a very solemn manner forbidden Vanderbeck intermeddling with the partnership property, and the jury had found also that in fact Lepan had forbidden Vanderbeck delivering this timber to the plaintiffs; but after obtaining the decree Lepan seems to have lain by and to have abstained from getting a Receiver appointed until the 8th September, 1868; and if in June he saw the timber delivered by Vanderbeck to the plaintiffs without at once openly interfering and in an unmistakable manner forbidding the plaintiffs to accept the timber from Vanderbeck, a jury might fairly presume that Lepan was aware that there were good reasons why the delivery of the timber to the plaintiffs should be perfected; and that notwithstanding Lepan's prohibition to Vanderbeck intermeddling with the timber, he was in fact tacitly acquiescing in the delivery. There does not appear to have been any reason for charging the plaintiffs with notice of the decree, if that would invalidate their title, or of the fact of a partnership having existed between Lepan and Vanderbeck, or of its dissolution. The case, as it appears to me, is susceptible of a complexion much more favourable to the plaintiffs than that in which it was presented to the jury by the learned Judge; for, looking at the

contract entered into between the plaintiffs and Vanderbeck, sworn to have been so entered into without any knowledge of the existence of a partnership between him and Lepad, and having regard to the advances made by the plaintiffs to Vanderbeck upon the faith of that contract, and assuming even, though not proved, that in June the plaintiffs had notice of the decree establishing that a partnership had existed, still I can see nothing in the evidence which could justify the delivery of the timber to the plaintiffs in June, being regarded in any other light than a *bona fide* delivery by the partner with whom the contract had been entered into, made in pursuance of the contract, in consummation of its objects, and of the duty of the partnership to the persons who, for valuable consideration, already paid to, and received by the partnership, were entitled to receive the timber in fulfilment of their contract. Any other disposition of the timber would, as it appears to me, have been a fraud upon the plaintiffs, and this view being also entertained by Lepad may perhaps account for his not having taken more prompt measures, immediately upon the decree being made, to have a Receiver appointed, and for his not having made application to the Court of Chancery to deprive the plaintiffs of the benefit of the delivery made to them in June, which he now contends was in contempt of the decree he had obtained. The Court of Chancery would have been the proper Court to which to submit the question, whether such a delivery as appears here to have been made in fulfilment of a contract was in contempt of the decree which Lepad had obtained against Vanderbeck. In my judgment, upon the evidence and finding of the jury, the property in the timber in question was well vested in the plaintiffs, and the verdict should therefore be entered for them, with \$4 damages, pursuant to the leave reserved: *Crawshay v. Collins* (15 Ves. 218); *Crawshay v. Maule* (1 Swanst. 495); *Fox v. Hanbury* (Cowp. 445); *Smith v. O'Riel* (1 East. 369); *Harvey v. Crickett* (5 M. & S. 336).

Rule absolute.

FOULDS V. CURTELET.

Action against husband for goods supplied to wife—Married Woman's Act

Defendant, during several years prior to, and for part of the year 1862, had a shop which he and his wife, who lived with him, attended, the shop being divided into two parts, in one of which defendant carried on a confectionery and saloon business, and in the other a fancy goods business, the latter being under the personal superintendence of the wife, who always gave the orders for the goods, which he, however, paid for. In 1862 defendant gave up the confectionery, &c., business, and then, as he stated, sold out the other business to his wife for a certain sum, she agreeing to pay him \$5 a week, which, however, she failed to do. She continued, with his permission, to carry on the fancy goods business, still living with him as before. There was no change either in the exterior or in the interior of the shop, except that the defendant no longer carried on the confectionery, &c., business there, though he was frequently seen on the premises. In 1869 the wife gave an order for the goods in question, just as she had always previously to 1862 been in the habit of doing: *Held*, that the business must be considered defendant's, and that he was liable to the plaintiff for the goods ordered in 1869.

Held, also, that the Married Woman's Act (C. S. U. C. ch. 73,) had no application to the case.

THIS was a County Court case, tried, at Toronto, before Morrison, J., without a jury.

It appeared that defendant's wife kept a fancy goods shop in Chatham, to which plaintiffs supplied the goods, for which payment was sought, in 1869. Her husband, the defendant, lived about half-a-mile from the shop, attending to a garden, and his wife came home to him every evening. He swore that he had had nothing to do with the business since 1860 or 1861, up to which time he had bought the goods for it himself. He said he had sold out to his wife in 1861, and was to get \$5 a week; that he was frequently in the store, but did nothing and received nothing from it; that no name was over the door; that he knew nothing of the plaintiffs supplying goods.

Plaintiffs' clerk swore he took the order for the goods from the wife; that he had known the family fourteen years, and that on former occasions, up to 1862, the husband himself ordered the goods, the wife selecting them; that the business was known as defendants; that when, in 1869, she gave the order, the witness was satisfied she had

her husband's authority; and that the premises were always the same.

Plaintiff lived in Toronto, defendant at Chatham.

Notes signed by Louis Curtelett were sent to the plaintiffs for the goods. They seemed to have always thought that this was defendant's name, but he swore his name was "Jean Louis," and it was found this signature was written by the wife.

It also appeared that down to about 1862 the husband kept a saloon, and carried on business in a shop or place connected with the shop, in which she carried on the fancy goods business.

On this evidence a nonsuit was entered, with leave to plaintiff to move to set it aside, and enter a verdict for \$162.

Harrison, Q. C., obtained a rule on the leave reserved, to which *McMahon* shewed cause, citing *Montague v. Benedict*, 3 B. & C. 631; *Petty v. Anderson*, 3 Bing. 170, 173; *Lett v. Commercial Bank*, 24 U. C. 552; *Balsam v. Robinson*, 19 C. P. 263; *Wright v. Gardner*, 28 U. C. 609; *Ramazotti v. Bowring*, 7 C. B. N. S. 851.

Harrison, Q. C., contra, cited *Manby v. Scott*, 2 Sm. L. C. 396, *March v. Ruddock*, 1 H. & N. 601; *Jolly v. Rees*, 15 C. B. N. S. 628; *Harrison v. Gray*, 13 L. T. N. S. 369.

HAGARTY, C. J.—I entertain a very strong opinion that where a husband knowingly permits his wife, who is cohabiting with him, to carry on a business of buying and selling in a shop which he is frequently seen in, that such business is to be considered to be his business, and that in the absence of notice to the contrary from him, all persons dealing in that shop, or supplying goods to it, are dealing not with a person under a known disability like a wife, but directly with him, and that his authority to her will be presumed.

The fact of his coming forward and swearing that he did not buy the goods, or authorize her to pledge his credit, or

that he did not interfere in the business, though cognizant from day to day of all that she was doing, cannot in my judgment free him from liability.

This business was, as he says, carried on for several years. Whatever benefit was derived therefrom would, indirectly at least, if not directly, enure to his benefit, in assisting to support his wife, or in case of his liability so to do.

I do not think this case is to depend on the decision of the many cases against husbands for alleged necessities supplied to their wives during cohabitation, or when living separately.

The notes to the leading case of *Manby v. Scott* (2 Smith's L.C. last Ed.) contains a full summary of the cases.

They do not, however, touch the question of the wife's trading. The chief case on that point is *Petty v. Anderson* (3 Bing. 170).

The defendant had been a baker and became inso'vent. During his imprisonment his wife set up and carried on the business of baker and confectioner on her own account. Tradesmen around gave credit to her. She paid the rent, and was rated to and paid poor and paving rates, and plaintiffs' invoices made out in her name.

The name "Andrew Anderson" formerly over the shop was changed to "Anderson."

The husband was frequently seen in the shop, and when called on for payment referred to his wife, saying she managed these things, and adding that he was a journeyman to his wife; that he received no wages, adding that plaintiff had better not go to law or perhaps he would get 4s. in the £.

Best, C. J., directed the jury to find for the plaintiff; commented on what defendant had said which he thought identified him with the business; that he was in the house where it was carried on, assisting in it and subsisting on the profits (for he declared he got no wages). He put it to the jury whether any man could doubt that she was the agent of her husband.

On motion for new trial the verdict was upheld. Park, J., said: "In *Langfoot v. Tiler* (1 Salk. 113,) the husband was holden liable (by Lord Holt) on no other ground than the fact of his cohabiting with his wife."

Burrough, J.: "The husband was present and assisting in the business, and therefore clearly liable to plaintiff's claims."

Best, C. J.: "The husband took advantage of the trade that was carried on, by living on the profits, and a legal presumption arises from the circumstances that the wife conducted the trade as his agent. In the present case he might have exonerated himself, if he chose, by discontinuing the trade his wife carried on. Undoubtedly the presumption arising from his presence might have been rebutted, but there were no facts to repel the presumption."

I think our case is stronger in many respects against the husband than the one just cited. The husband's insolvency, the change of name, the wife paying rent and rated for the poor, the surrounding tradesmen giving credit to her, and plaintiff making out his invoices to her, &c., are all wanting here.

In *Montague v. Benedict* (4 B. & B. 638,) Littledale, J., quotes *Comyn's Dig.* "Baron and Feme," 2, "It is laid down if the wife trades in goods and buys for her trade, while cohabiting with her husband, his assent is to be presumed." The authority for this in the Digest is Lord Holt's *dictum* in 1 Salk.

I think, on a proper explanation of the general principles of law governing a case like the present, a jury would properly find that the business here carried on was directly the husband's business, notwithstanding the evidence given by him; that as his wife lived with him, and he was constantly cognizant of the fact that the goods were bought and sold in the shop, and that he never forbade plaintiffs or any other party supplying such goods, they must be considered as supplied to him, precisely as if he had ordered them himself. I place little weight on the evidence here relied on as rebutting the legal presumption.

As Erle, C. J., in *Harrison v. Grady* (13 L. J. N. S. 370), says: "It is a presumption from cohabitation that the wife is the agent of her husband. Thus, the defendant says, 'You know my wife had no authority to pledge my credit,' and he relied on two conversations with plaintiff as to that fact. I think, as a juryman, that those conversations do not rebut the presumption arising from cohabitation."

The Married Woman's Act (U. C. Consol. ch. 73,) has, I think, no application to this case. Even if the marriage had taken place before May, 1859, the protection does not by the 1st section extend to any property received by a married woman from her husband during coverture. She had obtained no order for protection of her earnings, &c.

I think the goods in this shop were liable to execution for the husband's debts, and would be considered his property for all purposes. He could, I think, sell it, or mortgage or pledge it, and he alone could maintain trespass or trover for them, if taken by another, and he could sue for their price when sold. If so, it would be a most singular state of the law if he be not answerable for its value. I, of course, assume that he could at any time refuse to allow any goods to be brought on credit into the shop.

- The presumption from cohabitation seems almost irresistible. It would no doubt invest this case with a very different character if the parties lived separately.

Smallpiece v. Dawes (7 C. & P. 40,) before Park, B. Defendant had become bankrupt in 1824, but did not surrender, and his wife continued to carrying on the business of a fruiterer, and the action was brought for fruit supplied from November, 1828, to January, 1832. It was proved he had been seen in London a few times since 1824, but not at the shop, and others had seen him during that time in France; that he was seen present at one of his daughters' marriage in Mary-le-bone Church, in 1830; and again at another daughter's marriage in the same church, in 1833; and eighteen months after the last supply of goods, he was arrested at the wife's house (where shop was) in Oxford Street.

Park, B.: "This is not sufficient evidence to shew that Mrs. Dawes was the agent of her husband in the carrying on the trade. The defendant coming to his wife's house could only make him liable for necessities supplied to her."

I think if Mr. Dawes had been all this time living in London within half-a-mile of his wife, and she coming home every evening to live with him, and he was frequently seen in the shop, the result would have been wholly different; and had he sworn, as defendant here did, that he had nothing to do with the business which was wholly his wife's, the jury would still have been fully warranted in finding him liable, and that the business was his business.

In *McQueen* on Husband and Wife, 322, citing *Petty v. Anderson*, it is said: "The husband will be liable for the debts of the concern if it appears that he participates in the profits." 2 *Bright* on Husband and Wife: "It may be inferred * * * that at law, if by agreement the husband permits his wife to carry on business as a *feme sole*, her transactions in it with strangers will bind him, upon his presumed authority to do all necessary and proper acts for the purpose of carrying it on, except when that presumption cannot be raised, for such or the like reasons as in *Barlow v. Bishop* (1 East. 432)."

In that case a note was made payable to the order of a married woman in course of her trade, who carried on business as a sole trader with her husband's consent. She endorsed it for value in her own name. It was held by Lord Kenyon that endorsee could not recover against the maker, as by the first delivery of the note it became vested in the husband; but had she endorsed it in her husband's name, the Court was not prepared to say that would not have availed, as a jury might have presumed his authority to her for that purpose.

Roper on Husband and Wife, Vol. 2, 165, speaking of the wife carrying on business by the husband's agreement or permission after marriage, says, "When the agree-

ment originates during the marriage, it will be void against his creditors, but good against himself."

At page 170 there is the same expression of opinion as that quoted from Bright.

I think the rule seems stated rather too narrowly as to the husband participating in the profits of the business.

I have no doubt, from the evidence, that the defendant here did derive a benefit from this business, carried on as it was carried on from year to year, not, we are to assume, at a loss, in the support of his wife and family. It was said he was to receive £1 5s. a week for his alleged selling the stock to her in 1862.

I repeat that, on the facts here in evidence, I, as a jurymen, would have at once held that this business, carried on, as it was, by the wife, while cohabiting with her husband, and with his full knowledge and assent, must be considered as his business, so far as third persons were concerned.

The plaintiffs had formerly supplied goods to the business with his proved assent, and are not shewn to have ever been informed of any change. I think the law would be in a most unfortunate state if the plaintiffs cannot recover, and that the rule must be made absolute to enter verdict for them.

GWYNNE, J.—I am also of opinion that the nonsuit cannot be sustained. The short facts are these. For ten years or more, prior to 1869, the defendant with his wife and family have lived in a house, having a garden attached, just outside the limits of the Town of Chatham; and for some years prior to and into the year 1862, the defendant had a shop in the Town of Chatham, which he and his wife daily attended, and came home in the evening to their house and garden. The shop was divided into two compartments, in one of which the defendant personally superintended the business of a confectioner and pastry-cook, (which he was,) combined with a saloon, and in the other compartment he carried on a fancy goods business under the direct superintendence of his wife: she also gave orders for, and selected

the goods purchased, but he paid for them. In 1862, the defendant gave up the confectionery, pastry-cook and saloon business, and, as he says, he then also sold to his wife the fancy goods stock worth \$1,417, upon an agreement by her to pay him \$5 per week, no part of which has he ever received; ever since this alleged arrangement was made, the defendant's wife, by his permission, has daily come into Chatham to conduct the fancy goods business, and returned every evening to her husband's house. The outward appearance of the shop is the same as it was before 1862, and the inward appearance of the fancy goods compartment also, which was always personally superintended by the wife; the only visible difference is that the defendant does not as formerly conduct the confectionery and saloon business. In 1869, the defendant's wife gave the order for the goods in question in the same manner as she used to do prior to 1862. The result of all this is that the defendant's wife, according to defendant's own admission, has daily, since 1862, come into Chatham from the defendant's house, by his permission, to carry on a business which, prior to 1862, she had carried on for defendant, and which, since the defendant gave up the saloon business, she has carried on with defendant's permission, with stock of the defendant which, in 1862, was worth \$1,417, and with other stock purchased with the proceeds of the sale of the defendant's stock, and every evening the defendant's wife returns home. It is now contended that the business so conducted is not the business of the defendant, and that he incurs no responsibility whatever by his wife's acts in acquiring goods and bringing them into the shop.

It certainly appears to me that if this case had been tried by a jury, a very plain question presented itself which must have been submitted to them, and could not properly have been withheld from them, namely, whether the suggestion of the irresponsibility of the husband, and that the wife was not acting as his agent, is not a fraudulent contrivance and device, with the view of endeavouring to

enjoy the benefit of a successful business, and of evading the responsibility of a losing one. As, however, the case was tried under the Law Reform Act, and we can discharge the functions of jury and judge upon this motion, I must say, as a juror, that I can see no fact in the case which could justify me in finding that the presumption of law, that the acts of the wife were the acts of the husband, arising from her disposing of his stock-in-trade left with her, as he says, in 1862, and daily, by his permission, leaving her home to attend to the business carried on at the shop, has been displaced. By suffering her to keep the proceeds of the sale of the \$1,417 worth of goods left with her, he impliedly authorized her to apply them as she thought fit, and so in purchasing new goods with such proceeds: by permitting her to carry on the business for so many years since 1862, he must be assumed to have permitted her to do what was necessary for that purpose. By his own admission he appears to have gone to the shop at least once or twice a month, whenever he went into Chatham, and he must have seen then that she was adding to the stock. He must be taken to have permitted this, and what a person, who has exclusive power to prevent, permits, he must, I think, be taken to authorize. Upon the evidence, therefore, I am constrained to conclude, in fact and in law, that the business conducted by the wife was defendant's own business, and so that he is liable to the plaintiff. He can avoid all future responsibility by closing the shop, and by not permitting his wife to cover her acts under a cloak of her being a sole trader.

GALT, J., concurred.

Rule absolute to enter verdict for defendant.

KIRBY V. HALL.

Action on promissory note—Plea denying affixing of double stamps—Evidence—Notice of insufficiency of stamps when note endorsed—Right to recover.

In an action on a promissory note, by a subsequent holder, the only question raised by the plea was, whether or not, when he became the holder or received the note, the plaintiff had complied with the act by availing himself of the privilege of affixing the double stamps, the note having been formerly held to have been insufficiently stamped in the hands of a previous holder, who had in consequence failed to recover upon it.

The evidence, however, clearly shewed that when the note was received by the plaintiff, which he swore it was in good faith and for value, he did affix the double stamps, which were also duly cancelled, *but that he was aware, when he took it, of the former difficulty about the stamps :*

Held, that the defendant could not avail himself, under the pleadings, of this fact, if a defence, but that, as the record stood, plaintiff came within the protection of sec. 9 of 27 & 28 Vic. ch. 4.

DECLARATION against defendant, as maker of a note, payable to order of W. J. Downes, at six months from date, with interest, endorsed by payee to plaintiff.

Plea, (with others) that the note had not at the time when made, nor when endorsed to plaintiff, and when he became a party thereto and accepted and received it, the stamps required by law, &c., nor were said stamps affixed thereto in double value by plaintiff, or any person in his behalf, at the time when plaintiff became the holder of the note.

Issue thereon.

At the trial, at St. Catharines, before Gwynne, J., without a jury, it appeared that an action had been brought on this note against this defendant, at the suit of one Lowe, (see *Lowe v. Hall*, 20 C. P. 244,) claiming as endorsee of payee, and a nonsuit was entered on the defence, that all the stamps on the note were not duly cancelled, although the first stamp was. After this the note was endorsed by Lowe to this plaintiff. Plaintiff swore he had bought it *bonâ fide*, aware of the former difficulties about the stamps, and had given his own note to Mr. Lowe or order for it, less the interest due, and that he would and could pay his note due in two years from the day when the note in suit was endorsed to him, viz., 19th March, 1870, on

which day he affixed the double stamps and cancelled them as of that date. Two blue stamps, cancelled 1st January, 1868, 50c. and 40c., were on the note when plaintiff got it, and three green stamps were added, of 3c. each, and cancelled as of March 19th, 1870, and a 6c. green stamp also cancelled 19th March, 1870, appeared under one of the old blue stamps. The plaintiff's attorney swore one of the blue stamps came off in his office, and he gummed it on again the week of the trial; and he swore distinctly he put on four green stamps on 19th March, 1870; that he put them on for plaintiff, and plaintiff in his presence cancelled the whole four green stamps. For defendant it was objected that plaintiff failed on the third plea, that the added stamps were not cancelled as of the date. Leave was reserved to him to move to enter a nonsuit, if the Court should be of opinion that the evidence was sufficient. The learned Judge found for the plaintiff, and that the four green stamps were affixed and cancelled by and on behalf of plaintiff on 19th March, 1870, and that the 6c. green stamp was not one of those which had been on the note before uncanceled.

In Michaelmas Term *Harrison*, Q. C., obtained a rule for a nonsuit on the leave reserved, or for a new trial on the law, evidence, and weight of evidence, to which *McMichael* shewed cause, citing *Bradlaugh v. D. L. Rin*, L. R. 3 C. P. 286; *Hoffman v. Ringler*, 29 U. C. 581.

Harrison, Q. C., contra.

The Statutes cited are referred to in the judgment, which was delivered by

HAGARTY, C. J.—The point chiefly argued before us was that the Statutes did not protect a plaintiff like the present, who took the note with full notice, after failure of the action thereon for default of proper stamps. It was also objected that plaintiff's and McCarty's evidence was insufficient as to the affixing and cancelling.

As this note was made prior to 1st February, 1868, it is

governed by the two first Stamp Acts, 27 & 28 Vic. ch. 4, and 29 Vic. ch. 4, which Acts are (it is declared) to be construed as one Act.

Sec. 8 of the first Act provides that the stamps shall be affixed by the makers or drawers of notes and bills made within the Province under a penalty.

Sec. 9 declares that any person who makes, draws, accepts, endorses, signs, becomes a party to, or pays any note, and before such duty (or double duty, as the case may be,) has been paid, by affixing stamps, &c., shall incur a penalty of \$100, and, except when double duty is paid, the instrument shall be invalid; *except* that any subsequent party or person paying may, at the time of so paying or becoming a party, pay double duty, by affixing double stamps, &c., and cancelling same, &c., and such instrument shall thereby become valid; but no prior party, who ought to have paid the duty thereon, shall be released from the penalty.

Then, in the same Act, which is to be read with the first, sec. 4 proceeds: No party to, or holder of any note, &c., shall incur any penalty, by reason of the duty thereon not having been paid at the proper time and by the proper party, *provided* that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable on it; that he had no knowledge they were not affixed at the proper time, and that he pays such duty as soon as he acquires such knowledge; and any holder of such instrument may pay the duty and give it validity under sec. 9, without becoming a party thereto."

This last sec. 4 seems only to apply to protect parties from penalties who take notes, &c., apparently duly stamped, and innocent of any breach of the law; and he must pay the double duty as soon as he knows of the default. It therefore seems not to apply to this case, where the party is said to have put on the double stamps as soon as he acquired an interest in the note, knowing then the insufficiency of the stamps on it.

The Statutes read together make the *holder* of a note in same position as a *party* to it. *Stephens v. Berry* (15

C. P. 548,) is to that effect, decided wholly on the first of the two Acts: see also *Henderson v. Gesner* (25 U. C. 184). It seems therefore that the maker, payee, and endorsers, and Lowe, the endorsee, of this note, all became liable to the penalty for contravention of the Act, and in their respective hands the note was invalid.

I think, in ordinary cases, the subsequent endorsee or holder of a note, affixing double value of stamps, &c., as soon as he becomes the holder or party to the notes, may avail himself of the 9th sec. of the Act, and recover on the note.

I do not see how the point urged, as to the plaintiff being in a different position from an ordinary holder, arises on this record. The first plea, traversing the endorsement to plaintiff, was proved by a written admission given before trial. The second, denying that the plaintiff was holder when action commenced, was proved not merely in the ordinary way by production of the note, but also by all the evidence given. The third plea, already quoted, merely puts in issue, that to the note when made, or when endorsed to plaintiff, or when he became party to it, and accepted and received it, the proper stamps were not affixed; nor were stamps to double value affixed by plaintiff and at the time he became the holder.

Such a plea in no way raises any question as to plaintiff beyond denying that, when he became the holder or received the note, he did not comply with the act, by availing himself of the privilege of putting on the double amount of stamps previously deficient, &c., &c.

The evidence, as to affixing the necessary amount of stamps, was considered sufficient by the learned Judge, who acted without a jury. I do not see how, on this evidence, he could have arrived at any other conclusion, nor how we can be asked to hold it insufficient. The evidence was all one way, and we have no right to pronounce it false.

Had the defendant desired to raise any question as to a collusive transfer, and that the suit was in truth carried on by and on behalf of the former plaintiff, the record

should I think have presented a different set of issues. The learned Judge at the trial reports that he was not asked to find it as a matter of fact that any such state of facts existed. I may say, however, that on the evidence before him, and now before us, wholly uncontradicted as it was, it would not be easy to find in favour of the defendant on any such ground. It may be quite true that but for the previous failure to recover, the note would never have been transferred to the present plaintiff, but the point would remain whether the transfer was complete and actual, fully vesting the property and right of action in the note in the plaintiff.

I think the rule for nonsuit or new trial must be discharged.

Rule discharged.

IN RE MONTGOMERY ET AL. AND THE TOWNSHIP OF RALEIGH.

By-law—Drainage of lands—32 Vic., ch. 43 [Ont.]—Sufficiency of.

To a by-law, passed under 32 Vic., ch. 43 (Ont.), was annexed a schedule (declared to be part of the by-law), entitled, "Schedule shewing the benefit to be derived by each lot from the drainage to be performed under the by-law:" *Held*, that such a by-law, containing such a schedule, sufficiently indicated that the lands so assessed were assessed as the only lands within the municipality regarded as benefited by the proposed work: and that it was not necessary that the *by law* should specify *the mode* of ascertaining and determining the property to be benefited under sub-sec. 4 of sec. 2 of the said Act.

Held, also, that, supposing the question open for the consideration of the Court, whether or not the lands assessed were the only lands benefited, which it was objected the by-law did not shew, the onus of proving that other lands were also benefited, which should have been assessed, lay upon the applicants against the by-law, and that in this they had failed. But, *held*, that the objection that all the lands which would be benefited had not been assessed, or that the assessments upon the respective lots were overcharges, or that the by-law did not provide properly for determining what lands were benefited, were not grounds for moving to quash the same, as by the said 4th sub-section an appellate tribunal is appointed.

Held, also, that an objection, that the petition mentioned in the by-law was not signed by a majority of the resident owners of property assessed, &c., was not open to the applicants upon the motion, but that if it were, the onus of proof was upon them, and in this also they had failed.

Held, also, that the 3rd section of the by-law, set out below, was not open to the objection that it did not properly provide for a special rate sufficient to include a sinking fund for payment of the debentures therein mentioned, but provided for levying and raising certain instalments, with interest.

Held, also, that there was no necessity for the by-law to name a day in the financial year from which it was to take effect, as this was not required by the Statute which authorized its passage.

IN Michaelmas Term last, *Osler* obtained a rule *nisi* calling upon the municipality of the township of Raleigh to shew cause why By-law No. 204 of that municipality, entitled "A By-law for draining a certain portion of the township of Raleigh, the continuation thereof into the town of Chatham, thence into the township of Harwich, terminating in McGregor's Creek, and for borrowing money to complete the same," should not be quashed, upon eleven different grounds, of which, however, it only becomes necessary to mention the following, as those alone which were relied upon on the argument of the rule on its return this term; namely, 1st, Because the said by-law did not provide for ascertaining and determining what real property would be benefited by the proposed drainage; 2nd, That no by-law was passed for ascertaining or determining, through an engineer or other competent person, what lands would be benefited by the proposed drainage, and assessing the same, and that the said by-law itself did not make any provision therefor; 3rd, That the said by-law did not shew that the properties mentioned therein, and assessed thereby, were the only lands benefited by the proposed drainage, and that the property and lands mentioned therein, and assessed by the said by-law, were not the only lands benefited thereby; 4th, That the petition mentioned in the said by-law was not signed by a majority in number of the resident owners of the property mentioned in, and assessed by the said by-law, or of the property to be benefited by the proposed drainage, nor did a majority in number of the resident owners, or of all the owners of the property to be benefited, petition the council of the said corporation for the deepening of the stream, creek, or watercourse, or the draining of the property mentioned in

said by-law; 10th, That the said by-law did not properly provide for a special rate sufficient to include a sinking fund for the payment of the debentures therein mentioned, but provided for the levying and raising of certain instalments, with interest, and did not state or provide from what date such interest was to be charged; 11th, That the said by-law did not name any day in the financial year from which the same was to take effect.

It appeared that, on the 11th April, 1870, a petition was presented to the municipal council of the township of Raleigh, signed by Robert Smith and others, describing themselves as resident freeholders in the township of Raleigh, praying for the deepening of two streams, called Gregory's Creek and Mud Creek, in parts situate wholly within the township of Raleigh, into Indian Creek, also situate within the same township, but running into the adjoining township of Harwich, the contemplation being that Indian Creek should also be deepened as far as necessary, to carry off the water from Gregory's Creek and Mud Creek, when deepened sufficiently to drain the parts of the township of Raleigh mentioned in the petition, and the petition prayed that the council would be pleased to cause a survey and estimates to be made of the expense of deepening and widening the said creeks to such depths and widths as the engineer of the council should think necessary for the purposes aforesaid, and that the amount of the said expenses be assessed upon, and collected from the property in Raleigh, mentioned by numbers of lots and concessions, said to be benefited by the proposed work, as well as on any property to be benefited in the adjoining municipalities, and also on any roads or road allowances that might be benefited thereby, in proportion to the benefit to be derived therefrom by each respectively.

Upon this petition being presented, a resolution was passed by the council and entered upon the minutes of its proceedings, "That the petition of Robert Smith and others be entertained, and that the clerk notify Arthur Jones, P.L.S., to take the necessary levels, and make a plan

of the same, and to report to the council at its next meeting, on 2nd May, prox., with an estimate of the cost, and an assessment to meet the same, if found practicable."

This resolution being communicated to Mr. Jones, he proceeded to discharge the duty by the resolution imposed upon him, and his report was read in the council upon the 16th May, 1870.

Mr. Jones found that, in order to deepen Gregory's and Mud Creeks sufficiently to drain the lands in the township of Raleigh, it would be necessary to deepen and widen Indian Creek in the township of Harwich, and also McGregor's Creek, into which Indian Creek flowed, and passing through the township of Harwich and the town of Chatham until it reached the river Thames. He accordingly took the levels of the whole work, through the townships of Raleigh and Harwich and the town of Chatham, to the river Thames, and furnished plans of the proposed work, made an estimate of its cost, and made separate assessments, shewing, according to his judgment, the proportion of the expense which should be borne by each of the above municipalities, and assessing the several lots of land in the respective municipalities with the amounts which, in his judgment, should be charged on each, with the names of the several owners or occupants opposite each, except in the town of Chatham, and assessing separately roads and road allowances, and the Great Western Railway. The schedules containing the assessment upon the lands in each municipality were headed thus: "*Statement of the amounts assessed to lands and roads, in accordance with the benefit to be derived from the construction of the Mud Creek, Gregory and Indian Creek drains, in the township of Raleigh, and the continuation into the township of Harwich and through part of the town of Chatham.*"

When the report was read in the council on the 16th May, a resolution was passed by the council directing the Clerk to serve the Mayor of the town of Chatham and the Reeve of the township of Harwich with a copy of Mr. Jones's report, accompanied with a plan of the work.

The report and plan having been supplied in compliance with this resolution, arbitrations were entered into under clauses 11 to 15 of 32 Vic., ch. 43, between the respective municipalities of the township of Harwich and the town of Chatham and the township of Raleigh. The arbitrators between the township of Harwich and the township of Raleigh, by their award, adopted the assessment of Mr. Jones for Harwich, but the arbitrators between the town of Chatham and the township of Raleigh reduced Mr. Jones's assessment on the town of Chatham by the sum of \$437. This sum of \$437, so deducted from the town of Chatham's assessment, was, by the municipal council of Raleigh, added to the assessment upon the several lots in Raleigh, according to the best of their judgment, upon taking evidence of the benefit to be derived by each lot from the work.

The assessment having been so modified, the by-law was introduced into the council on the 29th August, and was passed through a first and second reading, and was ordered to be printed, and it was resolved that a Court of Appeal, under the Act, should be held on Friday, the 23rd day of September then next.

The by-law recited that a majority of the resident land owners of the lots numbered respectively (mentioning the numbers as in the schedule annexed to the by-law), had petitioned the municipal council of Raleigh to cause a drain to be opened (setting forth the metes and bounds of the work as prayed for by the petition); that the council had instructed Arthur Jones, P.L.S., to make a survey of the work, and to report to the council thereon; that Arthur Jones had accordingly made a survey, taken the levels, furnished plans, made an estimate, and reported the same to the council as amounting to \$4,637; that the heads of the corporations of Chatham and Harwich appealed, and arbitrations were had thereupon, and the arbitrators, by their award, charged Chatham with \$475, and Harwich with \$990, leaving a balance of \$3,172 to be raised by the corporation of the township of Raleigh and other sources;

that is to say, the township of Raleigh, \$3,000; the gravel road belonging to the St. Clair and Rondeau Company, \$150; and the Great Western Railway Company, \$20, "*which is apportioned to the lots, parts of lots, and roads, as per schedule hereunto annexed, and forming part of this by-law, subject to an appeal as by law provided.*" It then enacted (1) that the drain and branch should be made in accordance with the survey and levels taken by the said Arthur Jones; (2) that there should be raised, levied, and collected, from and off the lots and parts of lots in the township of Raleigh, to be benefited by making said drains, the sum of \$2,696; (3) that the said sum of \$2,696 should be divided into three annual equal payments, bearing interest at the rate of eight per cent. per annum, first payment to be made in 1871, and to continue in each year until the whole should be paid, for the purpose of paying one part of the cost of the said drainage, and the cost incidental thereto, *assessed* upon the lands aforesaid, and the collector should in each year place the same upon the collector's roll against each lot or part of lot, *as set forth in the annexed schedule*, to be collected and paid over to the treasurer as other taxes were collected and paid over, to form a sinking fund to meet the payment of debentures thereafter mentioned. It then provided for payment, by the treasurer of the municipality of the township, out of the general funds of the municipality, of the sum of \$306, assessed on roads and road allowances. It then provided for the issue of debentures for \$2,696, at a rate of interest not exceeding eight per cent. per annum, in sums of not less than \$100 each, payable in three years from the 15th December, 1870, and lastly, that if the amount to be collected from such assessment should, by reason of the lands being non-resident or otherwise, fall short of the sum required to meet the debentures or interest as they became due, the treasurer should pay such deficiency out of the general funds, and reimburse those funds when the assessment should be levied out of the land. The schedule, which was annexed to and made part of the by-law, was entitled, "Schedule

shewing the benefits to be derived by each lot from the drainage to be performed under this by-law." The by-law was duly advertised, as required by law, together with a notice informing all persons "wishing to appeal against any part of the above assessment" that the council would hold a court of appeal for that purpose, at the township hall, on Friday, the 23rd day of September next, and the notice required by section 3 of 32 Vic., ch. 43. Upon the 23rd September, Mr. Harris, the attorney and agent of the parties moving to have the by-law quashed, and upon their behalf, presented a notice of appeal to the court of appeal for the following reasons: That their lots, viz., Nos. 23 and 24, in the 3rd and 4th concessions of Raleigh, were too highly assessed in proportion to the benefit to be derived from said drain, and in proportion to other lots taxed; (2) that the lots to be taxed under the petition, and mentioned in the by-law, were not in full of the roads and lots to be benefited, consequently the tax proposed to be assessed against the above mentioned lands was too much; (3) that the petition was not signed by a majority of the resident land owners of the land to be benefited in the township of Raleigh. Mr. Harris was heard in support of this appeal, and a witness called by him, named Robert Payne, was examined upon oath. He did not seem to have given much evidence advantageous to the appellants; for the council, having heard the appeal, passed a resolution, "That the appeal of G. B. Harris, acting agent for Edward Thompson and others, trustees of the Ronalds' estate, be not entertained, inasmuch as no evidence has been given to sustain the same."

No appeal was made from this decision to the County Judge.

C. Robinson, Q. C., now shewed cause, citing *Re Michie and The City of Toronto*, 11 C. P. 379.

Osler, contra.

The Statutes are referred to in the judgment of the Court, which was delivered by

GWYNNE, J.—(After stating the facts of the case, as above set forth, his Lordship proceeded :) With a view to understanding thoroughly the point of these objections, it is necessary to inquire what the Statutes relating to the subject authorize, and what was in fact done in pursuance of that authority.

The Municipal Institutions Act, 29 & 30 Vic., ch. 51, sec. 281, as amended by the Ontario Statutes, 32 Vic., ch. 43, and 33 Vic., ch. 26, sec. 14, relating to the subject of drainage in townships, provides that “in case a majority in number of the resident owners, as shewn by the last revised assessment roll, or a majority of the non-resident owners, or a majority of all the owners of the property to be benefited in any part of any municipality, do petition the council for the deepening of any stream, creek, or watercourse, or for draining of the property (describing it), the council may procure an examination to be made by an engineer or other competent person, of the stream, creek, or watercourse proposed to be deepened, or of the property proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or person.”

If the council be of opinion that the deepening of such stream, creek, or watercourse, or the draining of the locality described, or a portion thereof, would be desirable, the council may pass a by-law (1) for providing for the deepening of the stream, creek, or watercourse, or the draining of the locality; (2) for assessing and levying, in the same manner as taxes are levied, upon the real property to be benefited by the deepening or draining, a special rate sufficient to include a sinking fund for the repayment of the debentures which such councils are hereby authorized to issue in such cases respectively, to provide funds for such improvements, and for so assessing and levying the same as other taxes are levied, by an assessment and rate on the real property so benefited as nearly as may be to the benefit derived by each lot, or portion of lot and road, in the locality; provided always, that any person whose property has been assessed for such deepening or drainage may pay the amount of such assessment, less the interest,

at any time before the debentures are issued: provided also, that any agreement on the part of any tenant to pay rates or taxes of the demised property shall not apply to the charges or assessments for draining under this Act, unless such agreement shall in express terms mention or refer to such charges or assessments; (3) for regulating the times and manner in which the assessment shall be paid; (4) for ascertaining and determining, through the engineer or person aforesaid, what real property will be benefited by the deepening or draining, and the proportion in which the assessment should be made on the various portions of lands so benefited, and subject in every case to an appeal to the council and the County Judge."

By the 32 Vic., ch. 43, sec. 3, it is enacted that the by-law shall not be valid unless, before the final passing thereof, the same has been published once or oftener in every week for six weeks in some newspaper in the municipality, or, if no newspaper be published therein, then in some newspaper published in the nearest municipality in which a newspaper is published, together with a notice that any one intending to apply to have such by-law, or any part of it, quashed, must make the application for that purpose to one of the Superior Courts of Law, at Toronto, during the term next ensuing the final passing of the by-law.

Sec. 4 provides for the council holding a court of appeal to hear and determine disputes as to the assessments made, subject to appeal to the County Judge.

Sec. 5, that notwithstanding any want of substance or form either in the by-law itself or in the time or manner of passing the same, the by-law, unless quashed upon an application made within the time limited, shall be a valid by-law.

Sec. 6, for the continuing the drainage, when necessary, into an adjoining municipality.

Sec. 7, for the event of the drain, although not continued into an adjoining municipality, benefiting the land in such adjoining municipality.

Sec. 8, that in such cases the engineer of the municipi-

pality, proposing to make the drain, shall determine by a report in what proportion the expense should be borne by such respective municipalities.

By sec. 10, such report is to be served on the head of an adjoining municipality benefited by the proposed work.

By sec. 11, such adjoining municipality to raise by by-law their proportion as determined by such engineer, unless they appeal therefrom, and in such case secs. 12, 13, 14, and 15, provide for the determination of such appeals by arbitrators, whose decision, by sec. 16, shall be conclusive.

The point involved in the first two objections mentioned in the rule, as ground for quashing this by-law, is, that it is contended that a correct critical construction of the 4th sub-sec. of the 2nd sec. of 32 Vic., ch. 43, requires us to hold that the *by-law* providing for the proposed drainage must be the mode by which shall be ascertained and determined, "*through the engineer* or person aforesaid, what real property will be benefited by the deepening or draining, and the proportion in which the assessment should be made on the various portions of lands so benefited.

It certainly appears difficult to understand what was the object and intent of the Legislature in enacting that the council of a municipality, contemplating the passing a by-law for draining a locality should in *that* by-law provide for ascertaining and determining, through the engineer, what property would be benefited, and the proportions in which the assessment should be borne by the lands benefited; for the whole scope and object of the Act would seem necessarily to require that these are matters which should be ascertained and determined before any by-law is passed authorizing the commencement of the work. The language of the Act in other parts shews, also, that the Legislature was quite alive to the necessity of these matters being ascertained and determined before the council passes a by-law providing for the work. The 1st section provides that upon the necessary petition being presented, the council may procure an examination to be made, by an engineer, or other competent person, of the

stream proposed to be deepened, or of the property proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or person." Now it is in the course of that examination only that it can be ascertained, as contemplated by the 6th section, whether or not it would be necessary to continue the deepening or drainage beyond the limits of the municipality in which the improvement originates, and if it should appear to be necessary, then the engineer or other competent person employed by the council of the municipality to whom the petition praying for the drainage had been presented, may continue his survey and levels into the adjoining municipality *until he finds fall enough* to carry the water beyond the limits of the municipality in which the deepening or draining was commenced; that is, *was proposed to be commenced*; and the 7th section provides that, although the deepening do not extend into an adjoining municipality, still it may benefit such municipality, and in which case the engineer, taking the levels and making the estimate for the proposed work, *shall* charge the lands to be so benefited, and the corporation or corporations whose roads would be improved by the proposed drainage, with such proportion of the cost of the work as he may deem just." Then the 8th section provides that the engineer making the survey, *shall determine and report* to the council by which he is employed whether the deepening or drainage shall be constructed and maintained solely at the expense of the municipality employing him, or at the expense of it and the adjoining municipality, *and in what proportions*. Then, by the 9th section, the engineer, or other competent person as aforesaid, that is employed to make the survey, and estimate the cost of the proposed work, shall make plans and specifications of the work to be constructed, and *charge the lands to be benefited by the work*.

All this being done, he is to make his report to the council by which he was employed, which council is to furnish a copy of such report to the head of an adjoining municipality, the lands in which are benefited by the pro-

posed work, and thereupon an arbitration is to be had for the purpose of conclusively determining whether the assessment made upon such adjoining municipality by the engineer who made the survey and estimate shall stand or be altered in such manner as to the arbitrators may seem just. All these proceedings seem to be necessarily matters which must be ascertained and determined, through the engineer, before any by-law is introduced into the municipality providing for the construction of the proposed work. Without this information it would be impossible for the council, petitioned to originate the work, to form that opinion, referred to in the 2nd section, which it is necessary for them to form *before* passing a by-law, namely, that the proposed work would be desirable.

We must certainly construe this Act, which confers so useful and beneficial a jurisdiction upon municipal councils, in such a manner *ut res magis valeat quam pereat*. If we should adopt the applicant's construction, we cannot see how the Act could be given effect to at all. The course adopted by the council seems to be the only practicable mode of giving effect to the Act. When the engineer made his report, accompanied with a schedule entitled, "Statement of the amounts assessed to lands and roads, *in accordance with the benefit to be derived from the construction of*" the proposed work, and when the council, after the award reducing the amount charged upon the lands benefited in the town of Chatham, applied the deficiency in increase of the assessment made by the engineer upon the lands benefited in Raleigh, in proportion to the benefit derived by such lands respectively, according to the judgment of the council and the evidence in that behalf taken by them, and made a corrected schedule, entitled "Schedule shewing the benefit to be derived by each lot from the drainage to be performed under this by-law," and annexed that to the by-law, and declared it to be part of the by-law, and passed the by-law containing such a schedule affecting the lands in Raleigh, then, in our opinion, inasmuch as the assessment so made is only con-

ditional upon and subject to its being approved on an appeal to the council, and from thence to the County Court Judge, the by-law may be said to be a by-law which does provide in the words of the 4th sub-sec. of sec. 2 of 32 Vic., ch. 43, for ascertaining and determining what real property will be benefited by the deepening or draining, and the proportion in which the assessment should be made on the various lands so benefited, subject to an appeal to the council and the County Judge;" but why the words "through the engineer or person aforesaid" should be repeated in this connection is difficult to see. We are of opinion that such a by-law, containing such a schedule, does sufficiently indicate that the lands so assessed are assessed as the only lands within the municipality regarded as benefited by the proposed work. As to the third objection, we are of opinion that, if 'it be a question open for us to consider whether or not the lands assessed are the only lands benefited, the onus of proving that other lands were also benefited in the township of Raleigh, which should have been assessed, lies upon the applicants, and the just conclusion to draw from the numerous affidavits filed is, that the applicants have wholly failed to establish their contention upon that point. We are, however, of opinion that the contention that *all* the lands which will be benefited by the proposed work have not been assessed, or that for that or any other reason the several assessments made upon the respective lots, or any of them, are overcharges; or that the by-law does not provide properly for determining what lands are benefited, do not constitute ground for moving to quash the by-law. All those matters are, by the 4th sub-sec. of sec. 2, made matters subject to appeal, and it is there that this contention should be tried and investigated. In this present case, all those points were made subjects of appeal to the council by the present applicants. The decision upon that appeal they did not carry to the County Judge, and they are, in my judgment, concluded by that appeal. The object of the Act, as it appears to me, is to make the

appeal to the council, if not appealed from to the County Judge, and the decision of the County Court Judge, if the appeal should be carried to him, as final and conclusive as the decision of the Court of Revision and of the County Court Judge respectively are under the Assessment Act, which is an Act that may be said to be *in pari materia* with the Municipal Institutions Act, of which 32 Vic. ch. 43, is but a part: such a mode of decision upon the several matters being provided by the Act seems to conclude the idea that these matters can be opened upon a motion to quash the by-law, and we are of opinion that they cannot. As to the fourth objection, if it be open to the applicants to urge it upon this motion, the onus of proving *it also*, in my opinion, lies upon the applicants, and they have failed to do so. Treating the by-law, with the schedule thereto annexed, to be a finding by the council, impliedly, that these are the only lands in Raleigh benefited by the work, the petition appears to have been signed by a majority of the resident *owners* of the property assessed. However, in my opinion, the objection is not open to the applicants upon this application. The by-law recites that a majority of the resident land owners of the lots numbered, &c., &c., (stating the lots assessed by the by-law as the lands, and impliedly, as I think, the only lands, benefited by the work in Raleigh), have petitioned, &c., &c. We are not prepared to say that if a municipal council, in violation of the apparent fact that a sufficient number to put the council in motion had not petitioned, such fact being made apparent in the manner indicated in the 194th and 195th sections of the Municipal Institutions Act, 29 & 30 Vic., ch. 51, should nevertheless proceed to pass a by-law imposing rates, that such a by-law could be sustained upon a motion, shewing these facts, made to quash it; but in the absence of all suggestion of fraud, and of all opposition to the by-law when before the council upon the ground taken, I think that a by-law which recites that a sufficient number had petitioned should be taken to be true, unless at least the recital be clearly established to be glaringly untrue, so as

to afford a presumption of fraud in the proceedings of the council. In some future case it may become necessary to determine *what majority* is sufficient to procure the action of a council. Four concessions in a township may be interested, in different degrees, in a work which would drain *all the lands* in those concessions, but it might be of more importance to the owners of the lands *in one* of those concessions than to all the owners of lands in the other three to procure the construction of the work. As at present advised, we do not see that a majority of the resident owners in the *one* concession would not comply with the terms of the Act, namely, "In case a majority in number of the resident owners, as shewn by the last revised assessment roll, of the property to be benefited, *in any part of any municipality*, do petition the council," &c., &c.; but in the present case there appears to be no foundation for the objection.

Then, as to the tenth objection. The section of the by-law to which this objection applies is the only one which has given us any degree of embarrassment. At first sight it does, perhaps, appear to be open to the objection of uncertainty as to the time from which the interest is to be computed; but, assuming it to be open to the objection of uncertainty, it may be questionable whether the uncertainty is of such a nature as to constitute illegality in the by-law, and to call for the interference of the Court to exercise the authority given by the Act of quashing the by-law in whole or in part for illegality, an authority which, as is decided by *Michie v. The City of Toronto* (11 C. P. 386), is left wholly to the discretion of the Court. Upon a careful consideration of the section, we think the objection is not insurmountable. The third section, which is the section in question, enacts "that the said sum of \$2,696 shall be divided into three annual equal payments, bearing interest at the rate of eight per cent. per annum, the first payment to be made in 1871, and to continue in each year until the whole is paid;

* * *

and the clerk shall, in each year, place the

same upon the collector's roll against each lot, or part of lot, as set forth in the annexed schedule, to be collected and paid over to the treasurer as other taxes are collected and paid over, to form a sinking fund to meet the payment of the debentures after mentioned."

This language appears to be competent and appropriate for imposing a rate of one-third part of the principal sum of \$2,696, *for* the years 1871, 1872, and 1873, and those rates being imposed *for* and to be levied *in* those years respectively, the 18th section of the Assessment Act, 32 Vic., ch. 36, may, we think, well apply to this by-law. That section enacts that the taxes and rates imposed or levied for any year shall be considered to have been imposed and to be due *on* and *from* the first day of January of the then current year, and end with the thirty-first day of December thereof, unless otherwise expressly provided for by the enactment or by-law under which the same are directed to be levied. The rate, then, *for* the year 1871, of one-third part of \$2,696, is to be considered to be imposed *on* the 1st January, 1871; and, as the by-law provides that the whole principal sum is to bear interest at eight per cent. per annum, *so as to form a sinking fund to meet the debentures*, which the by-law authorizes to be issued on the 15th December, 1870, we think that the interest to be levied under the by-law will be one year's interest on the whole sum of \$2,696 from the 1st January, 1871, upon which day the rate for 1871 becomes a debt, and one year's interest upon two-thirds of the principal sum from the 1st January, 1872, when the second instalment becomes a debt due, and a year's interest on the residue from the 1st January, 1873, when the last instalment becomes a debt due. These sums of interest being calculated by the clerk, and added to the respective instalments of principal, and placed upon the collector's roll in the respective years named, will, when levied, have realized the principal sum of \$2,696, with interest at eight per cent. per annum, as contemplated by the by-law, and will have constituted a very perfect sinking fund

for payment of the debentures, and the annual interest accruing thereon. This section of the by-law is, we think, open to this construction, and being so construed seems to be free from the objection taken.

So, neither does there seem to be any force in the eleventh objection. This by-law is not a by-law for contracting a debt by borrowing money, and for levying rates to pay such debt, within the meaning of the 226th section of 29 & 30 Vic., ch. 51. That section, as appears by the 6th sub-section thereof, relates to by-laws imposing *an annual special rate in the dollar* for paying the interest and creating an equal yearly sinking fund for paying the principal of the new debt. The Legislature has declared that such a by-law shall name a day in the financial year in which the same is passed when the by-law shall take effect; but *Michie. v. The City of Toronto* (11 C. P. 379) decides that the omission to name such a day in a by-law coming within the 226th section is not such a defect as to *require* the Court to quash the by-law. The Statute, however, which authorizes the by-law before us, does not require that such a day should be named in it, nor does there appear to be any occasion for such a day being inserted. The by-law imposes a specific tax *of principal* for three several years, to be levied in equal third parts in each year. So far as the rate is concerned the by-law declares it to be imposed *for* the years 1871, 1872, and 1873. So far as it authorizes the work to be done under it, the by-law takes effect from its passing, but it operates for imposing rates *for and in* those years.

The municipality has, I conceive, been put to considerable and unnecessary expense in resisting this application. Some of the objections made should not have been renewed after the appeal to the council in accordance with the provisions of the Act and the decision of the council thereon. If the parties were dissatisfied with the decision of the council upon the grounds of appeal, they should have carried their appeal to the Judge of the County Court, as required by the Act. Where municipal councils act as

the council, whose conduct is impugned here, appears to have done, with an anxious desire to comply with the provisions of the Act, and with a view to the promotion of the public benefit, I think that applications made in the interest of private individuals to quash a by-law of this description, if unsuccessful, should be visited with costs to be paid to the municipality. The members of these councils have onerous duties to discharge, and they should be sustained in the discharge of them when their conduct appears to be, as it does here, careful and cautious. The rule, therefore, will be discharged with costs.

Rule discharged, with costs.

SCOTT V. THE SCHOOL TRUSTEES OF BURGESS AND BATHURST.

School trustees—Judgment against—Alteration of sections—Mandamus to levy rates for payment of.

The plaintiff recovered a judgment in March, 1858, against the school trustees for a debt due to him for building a school-house for the section, and made several unsuccessful attempts to obtain payment of it from the trustees and their successors in office. The trustees always refused to levy a rate, or to pay the judgment. To an application for a *mandamus* to compel the trustees to levy a rate for payment of the judgment,

Held, no answer that since the recovery of the judgment two alterations had been made in the limits of the section, and that many changes had taken place among the ratepayers originally liable; or that the merits of the claim upon which the judgment was founded were capable of being impeached.

Johnston v. The School Trustees of Harwich, 30 U. C. R. 264, distinguished.

Osler obtained a rule, in Michaelmas Term last, calling upon John Armour, Robert Ritchie, and Carr Thompson, the trustees of Union School Section No. 1 of Burgess and No. 2 in Bathurst, to shew cause why a writ of *mandamus* should not be ordered to issue against them, as such trustees as aforesaid, commanding them, as such trustees, to levy and collect from the freeholders and

householders of such school section a sum of money sufficient for the payment and satisfaction of a certain judgment recovered against the trustees for the building of a school house for the said section.

It appeared that, since the service of the rule, one of the trustees had gone out of office, and leave to amend was applied for, so as to direct that the *mandamus*, if granted, should be to "The Corporation of the Trustees," and not to the individual members, which was granted.

It was admitted that the judgment obtained by the plaintiff was for the erection of the school-house of the section, and that the same was still unpaid and unsatisfied. The judgment was recovered on 15th March, 1858.

This term, *Kerr* shewed cause, on the ground that since the recovery of the judgment in question the school limits had been altered. He referred to *Johnston v. School Trustees of Harwich*, 30 U. C. R. 264; *Orr v. Raney*, 12 U. C. R. 377; *Corporation of Frontenac v. Corporation of Kingston*, 20 C. P. 49, 65; *Rex v. Lancashire*, 12 Ea. 366.

Osler, contra. A *mandamus* is the proper remedy: *Regina v. School Trustees of Tyendinaga*, 20 U. C. R. 528. Then, against whom is it to be made? Against all those whose duty it will be to execute the writ. If several form one artificial person, all must be parties, and their official capacity must be shewn. A personal remedy against the trustees does not exist: sec. 27, sub-sec. 20, C. S. U. C. ch. 64. The contract with the corporation is merged in the judgment. An action, apparently, would lie only against the individual trustees who made the contract. As to levying a retrospective rate, see *O'Donohoe v. Trustees of Thorah*, 5 C. P. 297; *Kennedy v. Burness*, 15 U. C. R. 473, and per Burns, J., at p. 497; *Ranney v. Macklem*, 9 C. P. 192; *Munson v. Collingwood*, 9 C. P. 497. On the point of delay in making the application, see *Archbold's Cr. Pr.* 281; *Rex v. Cockermouth*, 1 B. & Ad. 378; *Rex v. Stainforth*, 1 M. & S. 32; *Rex v. Js. of Cambridgeshire*, 1 D. & Ry. 325. As to the powers of trustees in imposing and collecting rates, &c., and their duties, he referred

to C. S. U. C. ch. 64, sec. 26, sub-secs. 2, 4, 10, 11, 12, 15; *Re Chief Superintendent and Kelly*, 12 U. C. R. 531; *Rea v. Carpenter*, 6 A. & E. 794; *Rex v. St. Michael, &c.*, 5 A. & E. 603; *Re Chief Superintendent and Hogg*, 15 C. P. 417; and to *Woods v. Reed*, 2 M. & W. 783, on the question of retrospective rates. The *Corporation of Frontenac v. Kingston*, 20 C. P. 49, is distinguishable in this, that the services here sued for were, by law, expressly to be collected in each year, and the Court held that the accumulation of arrears was not recoverable.

As to the alteration of the section, *Re Chief Superintendent and McRae*, 12 U. C. R. 525, shews that this does not make it a new section; and a judgment creditor of the section ought not to be affected by an alteration which he has no power to prevent. If the mere fact of alteration be an answer, he could have been defeated immediately after recovery of judgment. Moreover, the altered section has the benefit of the school-house; it may sell it, &c., &c.: sec. 44, 23 Vic., ch. 49, sec. 10.

GALT, J., delivered the judgment of the Court.

It is the duty of the trustees, and they are empowered by ch. 64, Consolidated Statutes of Upper Canada, sec. 27, to do whatever they may judge expedient with regard to the building and keeping in order the section school-house, and (as was admitted by Mr. Kerr) to levy rates for that purpose.

The only ground relied upon by Mr. Kerr, in opposing the rule, was, that since the judgment in this case was recovered a change has been made in the limits of the school section. On referring to the affidavits filed in support of this contention, we find that, in the year 1862, four years after the judgment had been recovered, an alteration was made in the school section, by adding three lots thereto, and that in the year 1868 another alteration was made by detaching therefrom two half-lots in the township of Bathurst, and two lots in the township of Burgess, and attaching thereto six lots in the township of Burgess.

Mr. Kerr relied upon the case of *The King v. The Justices of Lancashire*, 12 East. 366, in support of this argument. That case differs materially from the one before us. Lord Ellenborough, in giving judgment, says: "This is an application to the discretion of the Court, to shift a burden from those parties upon whom it has been, innocently perhaps, but certainly negligently, fixed, and to put it upon others who are also innocent of the charge." Such observations could have no place here. The parties who are now sought to be made responsible have for years been, and are still, enjoying the fruit of the labour and expenditure of the plaintiff. He appears to have adopted every means in his power to obtain payment of what we must assume to be a legal and proper claim, and we see no reason why the trustees should not now discharge a debt which should have been paid many years ago.

The case, also, of *Johnston v. School Trustees* (30 U. C. R. 264) was cited as shewing that on an application of this description, the Court will enquire into the circumstances from which the claim arises; but the judgment referred to in that case was very different from the present. It had been recovered by the applicant in a suit, brought by him against the school trustees in 1866, to indemnify him for damages and costs to which he had been put in consequence of the trustees, who were in office in 1862, and of whom the applicant was one, and himself, acting as collector, in illegally seizing the goods of one Stoddart, who replevied the same, and the applicant had appeared and defended the suit. In that case it was urged, on behalf of the trustees, that if a rate were imposed it would fall on different persons from those who were originally liable, assuming it to be a valid debt, and the Court, in the exercise of its discretion, refused to assist the applicant. This Court also referred to the same principle in *Frontenac v. Kingston* (20 C. P. 49), and held that, in cases in which an annual charge is sought to be enforced, that the demand should be made for each year, and, in cases in which a liability is incurred for a temporary purpose, or to suit what may be

called a casual liability, the persons there liable should be called upon to provide the necessary funds. But, as the Chief Justice said in his judgment, "No doubt there are claims which arise against corporations for wrongs done or services rendered in preceding years, and they can be enforced if brought within the established limit of time." The grounds of opposition stated in the affidavits filed in this case, are of the most trivial description, and shew no reason whatever why the debt should not be paid. This is not a case at all similar to any of those referred to, and, as already stated, the persons now called upon to pay are those actually occupying and using the school-house built by the plaintiff.

To give effect to Mr. Kerr's argument would be to say that, in our opinion, if a debt is due from the trustees of any one of the numerous school sections of the province, any change made in the limits of that section would deprive any creditor of his debt, even if, as in this instance, the debt was incurred for the erection of the school-house.

Let the *mandamus* issue.

Rule absolute for mandamus.

BUTTERS V. STANLEY ET AL.

Sale of goods—Payment on account—Removal by third party—Trove.

Plaintiff, through his agent, bought from A. & Co. a certain quantity of wheat, which was to be loaded on or before a day named, or as soon as bags and cars could be furnished by plaintiff for same. Plaintiff paid on account portion of the price agreed upon and furnished bags to the vendor, who filled them, but no cars were sent by him to take the wheat away. Whilst the wheat was lying ready to be despatched, and after the day named for loading it, defendants, holders of a warehouse receipt, demanded of the vendors the wheat covered by it, when plaintiff's wheat, some of which, amounting to 250 bushels, had been weighed, was delivered to and received by them. There was no demand and refusal of plaintiff's wheat, nor did plaintiff notify defendants that the wheat was his.

Held, that plaintiff was not entitled to possession of the wheat, and could not, therefore, maintain trover against defendants for it.

This was an action of trespass and trover, tried before Wilson, J., at the last Assizes for the County of Middlesex.

The facts appeared to have been, that the plaintiff claimed title under an agreement, of which the following was a copy: "Lucan, January 15, 1870.—I have this day sold F. Thomas fifteen cars of midge-proof wheat, or 5,250 bushels, at 72 cents, F. O. B., in bags, at Lucan and Granton, said wheat to be loaded on or before the 25th January, 1870, or as soon as bags and cars can be furnished for the same. The whole to be equal to sample marked F. A. and sealed.—F. ARMITAGE & Co." It further appeared that Thomas was the agent of plaintiff: that the plaintiff paid \$900 on account of this purchase: that immediately after the purchase or agreement plaintiff furnished bags to the vendor to receive the wheat: that during the month of January the servant of the vendor filled these bags with wheat, but no cars were sent by the plaintiff to take it away, and the agent of the plaintiff saw the wheat in the bags before it was removed by the defendants: that while it remained in the warehouse, ready to be loaded, and after the 25th January, the defendants, who held a warehouse receipt, dated in November, 1869, for wheat of a similar description to that placed in plaintiff's bags, called at the warehouse and demanded the wheat covered by their receipt. There was plenty of wheat of the same description, and in the same bin as that from which the bags had been filled, to meet the plaintiff's demand, and the servant of the warehouseman, who had filled the bags, stated: "I gave O'Neil the wheat in the bags, because we could not get to the bin conveniently while the bags were all over the floor." The defendants took the wheat away, and transferred it to another warehouse, and the servant of the original warehouseman assisted in emptying the bags, and weighed the wheat to the defendants, and the bags were returned. Some days after, but during which time the plaintiff might, if he had chosen, have had his bags refilled and renewed, a third party came and took possession of all the wheat in the warehouse, and in consequence the plaintiff never received any wheat. The wheat in some of the bags, amounting to 250 bushels, had been weighed, and the

weighed parcel was by itself; none of the rest that had been bagged was weighed. It was asserted, on the part of the plaintiff, that the defendants knew the wheat in the bags had been bagged for the plaintiff; but this was expressly denied on the part of the defendants. The plaintiff subsequently purchased the whole of the wheat which the defendants had, including the wheat in question, from the defendants. The plaintiff also purchased the wheat remaining in the warehouse, from the third party, who had taken possession of it. There was no evidence of a demand and refusal of the wheat. The complaint made by plaintiff's agent referred to the bags, and not to the wheat.

At the close of the case the learned Judge entered a verdict for plaintiff for the wheat in the bags weighed, reserving leave to the defendants to move to enter a verdict or for a non-suit.

In Michaelmas Term last, *Ferguson* obtained a rule *nisi* on the leave reserved, to which *C. S. Jones* shewed cause, citing *Fouldes v. Willoughby*, 8 M. & W. 540; *Aldridge v. Johnson*, 7 E. & B. 885; *McCoombie v. Davies*, 6 Ea. 538.

Glass, contra, cited *Supple v. Gilmor*, 5 C. P. 318; *McCoombie v. Davies*, *supra*.

GALT, J.—At the time when the wheat was removed there was more than sufficient left to meet the demand of the defendants, and the conversion complained of was the subsequent sale of the said wheat to the plaintiff himself. The mere fact that the defendants received the wheat from the agent of the warehouseman under a claim of right, would not in itself amount to a conversion; to make it so, it appears to me, under the authority of *Thorogood v. Robinson* (6 Q. B. 769), that a demand and refusal was necessary. It was but reasonable that the plaintiff should have expressly notified the defendants that he claimed the identical wheat as his property, so that they might have had an opportunity of claiming a fulfilment of their ware-

house receipt. There was wheat enough and time enough to have enabled them to do this, but the plaintiff remained passive, and subsequently the whole of that wheat came to his own possession.

The agreement of sale was for 5,250 bushels of wheat, part at Granton and part at Lucan. It was an entire purchase, and the plaintiff paid \$900 on account: the purchase money would have been \$3,780. It is true that a sum of \$1,008 was subsequently paid on account of four car loads shipped from Lucan, but beyond doubt the \$900 was a part payment on the whole purchase, and was never, with the assent of the vendor, applied to any particular portion of the wheat.

The terms of the bargain must not be overlooked. The plaintiff was to furnish bags to receive and cars to remove the wheat, while the vendor was to fill those bags and place them on the cars free of charge. The plaintiff did provide a certain number of bags, but he did not furnish the cars. Suppose the plaintiff had sent cars, was the vendor under any obligation to put the wheat in question on those cars without receiving payment? that is to say, could the plaintiff have insisted on applying the \$900 in payment of that identical wheat? or might not the vendor have said, No, I will retain the \$900 until you have completed your contract, and I shall appropriate that sum against the last wheat which you receive under it?" Judging from the evidence as to other parts of the same transaction, this would appear to have been the true understanding between them, because in the case of the wheat stored at Lucan, to which the 900 was equally applicable, they acted on this principle.

The plaintiff's agent says: "I paid \$900 on the purchase of the fifteen car loads; paid it shortly after the agreement; I paid \$1,008 after, on shipping bills of wheat from Lucan." The case of *Bloxam v. Sanders* (4 B. & C. p. 940) establishes that "when goods are sold and nothing is said as to the time of delivery or the time of payment, and every thing the seller has to do with them is complete, the property

vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price, &c., &c. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both of those rights. Trover is an action of that description, it requires right of property and right of possession to support it.

In my opinion, the evidence fails to establish that the plaintiff was entitled to the possession of this property, and a verdict should be entered for defendants.

GWYNNE, J.—If this case turned upon the proper answer to be given to the question, whether or not the fact of Armitage & Co. having filled bags, supplied by the plaintiff, with wheat, and having weighed all or any of such bags, passed the property to the plaintiff in the wheat in the bags which were weighed, I should require time for further consideration before I could, upon the evidence given in this case, answer that question in the affirmative. It would depend upon the intention of Armitage & Co.: *Wait v. Baker* (2 Ex. 1); *Curtle v. Swarder* (6 H. & N. 828); and, as at present advised, I must confess that the evidence given as to the filling the bags, and weighing the wheat put into them, appears to me to be quite consistent with Armitage & Co. having done that for the purpose merely of convenience, and to have the wheat ready for delivery when the plaintiff should come to complete his contract by payment of the balance of the purchase money; and quite consistent with Armitage & Co. intending to retain their property in the wheat until such balance should be paid. But the plaintiff is not entitled to recover against these defendants in this action, unless at the time that Armitage

& Co. gave the wheat in question to the defendants, in fulfilment of a contract of sale previously made with them, the plaintiff had not only the right of property in himself, in the wheat in question, but also the right to the immediate possession of it as against Armitage & Co.; unless, in fact, Armitage & Co., *by the act* of delivery to the defendants, became liable to the plaintiff for the wrongful conversion of his property.

Now the contract upon which the \$900 was paid by the plaintiff to Armitage & Co., appears by the evidence of Thomas, the plaintiff's agent, to have been a contract for the purchase of 15 car loads, or 5,280 bushels, or thereabouts, at 72 cents per bushel, and the \$900 was an advance upon this entire contract. True it is that the wheat was to be delivered in bags, to be supplied by the plaintiff, and free on cars, to be supplied by him also; but before he could demand the possession of any wheat under that contract, it would have been necessary for him to tender the balance of the contract price, after it should have been ascertained by weighing the wheat, unless Armitage & Co., by a new arrangement, should contract to deliver to plaintiff without such payment: to put Armitage & Co. in default, under the contract, a tender of the balance of purchase money would have been necessary. The payment of the \$900 being on the entire contract, Armitage & Co., I apprehend, would have had a right to retain it as a security in their hands that the plaintiff would take the whole fifteen car loads, and the plaintiff had no right to enforce delivery to him, under the contract, of so much wheat merely as at the price agreed upon should represent the \$900. At the time, then, that Armitage's agent delivered the wheat in question to the defendants, it is clear upon the evidence that the plaintiff had no such right to the immediate possession of the wheat in question as to make Armitage liable to the plaintiff in trover for the act of delivery to the defendants, and the plaintiff offers no evidence to shew that he has at any time since acquired such right of immediate possession to this

particular wheat, and consequently this action cannot be maintained against the defendants.

HAGARTY, C. J., concurred.

Rule absolute.

FORSYTH V. GALT ET AL.

Will—Construction—Executory devise—OR, when to be read AND.

By his will, dated 28th January, 1840, testator devised as follows: "I will and devise to my son C. all and singular, &c. (certain land), to be by him peaceably possessed and enjoyed for and during his natural life, and after his decease I will and devise the same to the heirs of the said C., and to their heirs and assigns for ever; in consideration whereof I will, order, and direct, that the said C. shall pay yearly and every year unto his mother the sum of £25 during her widowhood; and also that he shall pay to his sister M. the sum of £25 yearly and every year, so long as she shall remain single." Then followed a devise to his son I. B. of certain lands in similar words, with a like charge in favor of his brother, and sister M.

The will further provided, "I also declare it to be my will and desire that the timber on the two farms aforesaid shall be equally divided between my two sons C. and I. B., as they may think proper, and that that division shall remain permanently established for them and their heirs, and for the heirs and assigns of the heirs of the said C. and I. B.;" and then, after certain devises and bequests to others of his children, including a gift of \$500 to his son R., there was this further provision, "And in the event of either of my sons C., I. B., or R., or either of my daughters S. or M., dying before they come of age, or without issue, then and in such case the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike."

At the date of the will C. and I. B. were over 21 years of age, and R. was under 21 years of age:

Held, that C. took an estate in fee, subject to an executory devise over in the event of his dying without leaving lawful issue; and that in his case *or*, in the clause creating the executory devise, could not be read *and*.

Per *Gwynne*, J., that the clause was to be read, "and in the event of my son C. dying without lawful issue, and in the event of my son I. B. dying without lawful issue, and in the event of my son R. dying before coming of age, and without lawful issue," &c.

SPECIAL CASE.

Ejectment for lots Nos. 7, in the 1st and 2nd concessions, with the broken front, Township of Bertie, County of Welland.

The plaintiff claimed as heir-at-law of Isaac Brock Forsyth, who, together with his sisters Sophronia and Melissa

Forsyth, plaintiff contended, took the fee in the said lands, under a certain devise over in the will of their father William Forsyth, contingent upon the death of his son Collingwood Forsyth without issue.

The defendants' claimed the land under one Nelson Forsyth, the eldest brother of the whole blood, and heir-at-law of the said Collingwood Forsyth.

In the year 1841, William Forsyth, the testator, died, seised in fee and in possession of the premises in question, having been twice married, leaving Nelson Forsyth, his eldest son by his last marriage, and Collingwood, his second son by the same marriage, and Isaac Brock Forsyth, Rodney, Sophronia, and Melissa, him surviving; and having made his last will and testament, duly executed to pass real estate.

The devise to Collingwood of the lands in question was as follows:—"Secondly, I will and devise to my son Collingwood all and singular that farm or tract of land and premises situate lying and being in the Township of Bertie, being composed of lot number seven in the first and second concessions of the Township of Bertie, containing two hundred and sixteen acres, be the same more or less, to be by him, the said Collingwood Forsyth, peaceably possessed and enjoyed for and during his natural life, and after his decease I will and devise the same to the heir of the said Collingwood Forsyth and their heirs and assigns for ever; in consideration whereof I will, order, and direct that the said Collingwood Forsyth shall pay each and every year unto his mother the sum of £25 currency during her widowhood; and also that he shall pay to his sister Melissa Forsyth the sum of £25 currency yearly and every year, so long as she shall remain single."

The will further provided as follows:—"I also declare it to be my will and desire that the timber on the two farms aforesaid shall be equally divided between my two sons Collingwood and Isaac Brock Forsyth as they may think proper, and that that division shall remain permanently established for them and their heirs, and for the heirs and

assigns of the heirs of the said Collingwood and Isaac Brock." Then followed certain devises of land and money to certain other children, viz., Rodney, Isaac Brock, Sophronia, and Melissa, including a devise of \$500 to Rodney, and then there was a devise over in these words:—"And in the event of either of my sons Collingwood Forsyth, Isaac Brock Forsyth, or Rodney Forsyth, or either of my daughters Sophronia Forsyth, or Melissa Forsyth, dying before they come of age, or, without lawful issue, then and in such case the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike."

Rodney died before Collingwood, under age, and without issue.

Collingwood died 7th October, 1849, aged about thirty-seven years, unmarried and intestate, leaving Nelson, Isaac Brock, Sophronia, and Melissa, him surviving.

Isaac Brock died 22nd August, 1850, intestate, plaintiff being his eldest son and heir-at-law.

The other parties named in the will were the children of the first marriage.

The question for the opinion of the Court, upon the facts stated and terms of the will, was, whether, upon the death of Collingwood Forsyth, the executory devise over took effect in favor of Isaac Brock, Sophronia, and Melissa Forsyth; or, whether Collingwood Forsyth had an estate in fee in the lands on his attaining the age of twenty-one years, which upon his death descended upon his heir-at-law Nelson Forsyth, under whom the defendant claimed.

S. M. Jarvis, for the plaintiff, referred to *Doe Forsyth v. Quackenbush*, 10 U. C. 148; *Wigram's Ex. Ev. in Aid of Interpretation of Wills*, 10; *Jarman Wills*, 3rd ed. II. 472; *Doe Ellis v. Ellis*, 9 Ea. 382.

J. H. Cameron, Q. C., and *Anderson*, contra, cited *Mortimer v. Hartley*, 6 C. B. 819, S. C. 6 Ex. 47; *Eastman v. Baker*, 1 Taunt. 174; *Doe Sheers v. Jeffery*, 7 T. R. 589; *Jarman Wills*, 3rd Ed. II. 251; *Hansom v. Graham*, Tudor's L. C. on R. P. 60.

HAGARTY, J.—This will was before the Queen's Bench in *Doe Forsyth v. Quackenbush* (10 U. C. 148).

The plaintiff there was heir-at-law of testator; his claim was necessarily defeated by the will, as the success of either of the constructions here contended for is fatal to him.

In that case, however, the general effect of the will was discussed. Sir J. Robinson held distinctly that "Collingwood took an estate in fee simple, subject to an executory devise over if he should die under twenty-one, *and* without issue" (reading *and* for *or*).

Draper, J., did not discuss the point, considering that in neither view could the plaintiff recover.

Burns, J., held, that Collingwood took an estate tail; "that the will should be read without making any alteration, the effect of which is, that the devise over took effect upon the failure of the estate tail."

The will is not drawn with any technical precision. It is most likely that in the direct devise to Collingwood to hold during his life, and after his decease to his heirs and to their heirs and assigns for ever," the testator, by the words "to his heirs," had in his mind "heirs of his body." The legal effect, however, of the devise standing by itself was to give an estate in fee simple.

The clause reads thus (after a legacy of \$500 to his son Rodney to be paid to him as soon as he shall attain the age of twenty-one years): "And in the event of either of my sons Collingwood Forsyth, Isaac Brock Forsyth, or Rodney Forsyth, or either of my daughters Sophronia Forsyth, or Melissa Forsyth, dying before they come of lawful age, or without lawful issue, then, and in such case, the legacies herein devised and bequeathed to them, shall be equally divided amongst the surviving ones, share and share alike."

Then follows a provision for the maintenance and support of his son Rodney "from the proceeds of the lands herein devised to my two sons Collingwood and Issac Brock Forsyth," and for his education out of the interest of the moneys bequeathed to him.

We must of course assume the testator, when he made

this will, to have fully comprehended the position of his children at that time.

The case states that when the will was made, Collingwood was twenty-eight years old; Isaac Brock, twenty-two; Rodney, thirteen; Sophronia, twenty-six, and a married woman; Melissa, sixteen. When he penned this clause three out of the five children named had been for some time over twenty-one years. Collingwood, whose estate is now in question, had been seven years of full age.

The clause, therefore, had not a complete application to all the parties named.

As to Collingwood, Isaac Brock, and Sophronia, the only contingency to affect them would be "dying without lawful issue."

If we read "and" for "or," as is suggested, the double event could not possibly happen in either of their cases.

As the clause stands in the will it is so worded as to have a contingent application to all the parties named. If it be altered, as suggested, it can only apply to two out of the five persons.

It may be observed that there is no direct devise of lands to either Rodney or Melissa, the then minor children.

It may perhaps be considered a strong construction to vary the word in the clause, so as wholly to exclude from its operation three out of the persons named.

In the case in the Queen's Bench no express notice seems to be taken of the then state of the family. It is stated that "Collingwood Forsyth died in September, 1850, aged about thirty, and unmarried."

If this were correct he would have been a minor at date of the will.

It now appears that this was an error, and, as he was the eldest of the five devisees, naturally suggested their being all minors at that time.

It appears to me that the judgment of the Court proceeded on the assumption of their being all then under age.

Sir J. Robinson said (as to Collingwood), that the testa-

tor "desired to provide for the possible case of his dying before he was of capacity to devise, and having no children, in which case the testator meant to resume, as it were, by assumption, the disposal of the estate rather than it should be left to descend to that one of his, the testator's, children, who would be Collingwood's heir. I take it to be clear, on the authority of several adjudged cases, that this is the construction which we are to carry into effect; and this being so, Collingwood took an estate in fee simple, subject to an executory devise over in case he should die under twenty-one, *and* without issue. Then, when he had attained twenty-one, and the contingency could not happen on which the devise over might take effect, the estate which he had taken, as by purchase, became absolute in him in fee simple, and on his dying intestate went to his heir."

Burns, J., who held that Collingwood took an estate tail, says, that the testator may have desired that his son should not marry under age, and by this devise, have, without directly forbidding such marriage, evinced to his heirs that if he did marry and have issue, and died under age, the issue should not inherit.

The case, therefore, loses most of its weight as a decision for our guidance.

In *Jarmyn*, vol. 1, 349 (2nd ed.) it is said: "Though it is, as we have seen, the will itself (and not the intention elsewhere collected) which constitutes the real and only object to be expounded, yet, in performing this office, a Court of Construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of dispositions which occupied the mind of the testator. To this end it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret, and, guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from a strict construction of the testator's language, without (to borrow the words of an elegant

writer) allowing conjectural interpretation to usurp the place of judicial exposition." Many cases are cited on this head, to which I have referred.

It is to be noted that this resort to the surrounding circumstances is generally for the purpose (in Mr. Jarmyn's words) to justify a departure from a strict construction of the testator's language. In this case a reference to such circumstances would rather tend to adhering to the precise language used than departing from it.

In *Attorney General v. Drummond* (1 D. & W. 366) Lord St. Leonards says: "I have a right, if a man makes a settlement for his children *in which I find something ambiguous*, to ask what was the state of the family of the settler, and all the circumstances in which he was placed in relation to the property which he has disposed of. I have a right (and it is often necessary to exercise it) to make a similar enquiry in the case of testamentary dispositions. In many cases one construction would be given to particular words if children were living at the time the instrument were executed; another construction if there were no children living at that period. The Court, therefore, have not only the right, but it is its duty to enquire into the surrounding circumstances before it can approach the construction of the instrument itself; but I freely admit (indeed, I lay it down as a rule from which I will never depart,) that when the Court has possession of all these facts which it is entitled to know, they will only enable the Court to put a construction on the instrument consistent with the words, and the Judge is not at liberty, because he has acquired a knowledge of the facts, to put a construction on the words which they do not fairly bear; but the right to enquire to the extent I have stated, admits of no doubt."

The subject is fully treated in *Wigram on Wills* (ed. of 1858).

In *Attorney General v. Grote* Sir W. Grant, Master of the Rolls, said, "To authorize a departure from the words of a will, it is not enough to doubt whether they were used in

the sense which they properly bear. The Court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were meant to be used ;” and Lord Eldon’s words are (as cited in Appendix to Wigram, No. 2), “ Individual belief ought not to govern the case, it must be judicial persuasion. In *Abbot v. Middleton* (7 H. L. 94), Lord St. Leonards says: “ You are not at liberty to transpose, to add to, to subtract, to substitute one word for another, or to take a confined expression and enlarge it without absolute necessity. You must find an intention on the face of the will to authorize you to do so. When I say ‘ upon the face of the will ’ you are by settled rules of law at liberty to place yourself in the same situation in which the testator himself stood. You are entitled to enquire about his family, and the position in which he was placed with regard to his property.”

On the general question of the substitution of *and* for *or* in *Johnson v. Simcock* (6 H. & N. 6) and in *Error* (7 H. & N. 344) the law is fully reviewed, and the language of Lord Cranworth, in *Gray v. Pearson* (6 H. L. 80), quoted : “ When a testator devises an estate, so as to give the control of the fee simple to his son, or to any other person ; but if he dies under the age of twenty-one, *or* without issue, then over, in that case the word *or* must have meant *and*, and, though it is improperly used, must be taken to be used conjunctively and not disjunctively ; because it never could have been the testator’s intention, in giving an estate to a person and his heirs, to give it away from that person’s issue, if he should happen to die before twenty-one having issue.”

The rule, therefore, it is clear, is applied to effectuate, not to frustrate, testator’s intention. Assuming that he meant to give a child a fee simple, he can hardly be supposed to intend the estate to go over to the disinherison of issue born before the devisee attained twenty-one.

I have little doubt that, in the direct devise to Collingwood, as already noticed, the testator intended to limit the estate to his issue, although the rules of law compel us to hold them sufficient to give a fee simple.

If we assume such to have been his general view, it forms another argument against reading *and* for *or*.

There is also a curiously worded direction, after devising the lands respectively to Collingwood and Isaac, "that the timber on the two farms aforesaid shall be equally divided between my two sons Collingwood and Isaac, as they may think proper, and that that division shall remain permanently established for them and their heirs, and for the heirs and assigns of the heirs of the said Collingwood and Isaac."

To apply this language to two persons to whom he had just given the absolute ownership, seems a most futile proceeding. But if we assume that he thought he had only given a lesser estate liable to defeazance, we may possibly better appreciate his words, and guess what was passing in his mind when he declared that the division of the timber should be permanently established for them and their heirs, and the heirs and assigns of their heirs.

It seems to me next to impossible to speak with precision or confidence on the legal effect of the disputed clause.

He has just given a legacy of \$500 to Rodney in such words as would, I presume, give him a vested interest. In a subsequent part he gives a legacy of £250 to each of his daughters, Sophronia (then married) and Melissa, giving them vested interests; Sophronia's legacy payable in a year from his death, and Melissa's payable on her attaining eighteen, or marrying.

After the \$500 legacy to Rodney (then under age) came the words: "And in the event of either of my sons Collingwood Forsyth, Isaac Brock Forsyth, or either of my daughters Sophronia Forsyth, or Melissa Forsyth, dying before they come of lawful age, or without lawful issue, then and in such case the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike."

It is *possible* that testator may have intended to put the three sons as a class, between whom there should be survivorship, and the daughters as another class. Such a con-

struction would hardly meet any of the difficulties, for the legacies to the daughters are payable at specific periods, and the annual charges in favor of Melissa on the two sons could hardly be a proper subject for survivorship.

I cannot see my way to reading *and* for *or*, as far as Collingwood and Isaac are concerned; and, fully aware as I am of the extraordinary difficulties presented by the clause as to the other legatees, I think it must stand as it is written.

If the devise over took effect (Rodney having died under age and unmarried) the plaintiff, who is eldest son and heir-at-law of Isaac, does not claim the whole estate, but merely that his father Isaac, with Sophronia and Melissa, took the estate on Collingwood's death.

I do not deem it necessary to discuss Rodney's position, or that of his representatives as to his legacy. I assume that, in this much contested clause, the words "the legacies herein devised and bequeathed to them" cover the landed property devised.

The decision I have, after much consideration, arrived at, is pronounced with some hesitation.

The property is said to be valuable, and I have no doubt the opinion of an Appellate Court will be taken.

We are deprived of the assistance of my brother Galt, in consequence of his having a nominal, though not a beneficial, interest in the result.

I have not failed to consider the effect of the charges on Collingwood and Isaac respectively to pay annuities to their mother and sister. The existence of such charges, not on the land, but on the person, is generally taken to shew that a fee simple passed instead of a lesser estate. If the estate here go over the annuitant might outlive the immediate devisee; but I do not think that the charge can prevent the operation of an executory devise over, created not by implication, but by express words.

I think the plaintiff is entitled to the *postea*.

GWYNNE, J.—It appears to be clear that the devise to the testator's son Collingwood, as set forth in the second

paragraph of the will, if that paragraph had stood alone, was a devise in fee simple of the lands therein mentioned. So likewise the devise in the third paragraph was a devise of the lands therein mentioned to the testator's son, Isaac Brock, in fee.

To the testator's son Rodney no lands are devised: all that is bequeathed to him is a pecuniary legacy: that bequest is contained in the fourth paragraph of the will. Now it is in this paragraph, directly following the bequest to Rodney, that the words, which raise the difficulty we have to dispose of, are inserted; namely, "And in the event of either of my sons, Collingwood Forsyth, Isaac Brock Forsyth, or Rodney Forsyth, or either of my daughters, Sophronia, or Melissa, dying before they come of lawful age, or without lawful issue, then and in such case the legacies herein devised and bequeathed to them shall be equally divided among the surviving ones, share and share alike."

The legacy to Rodney is made *payable to him* absolutely, upon his arriving at the age of twenty-one years, and, as there can be no executory devise over of personalty after an absolute interest vested in possession (*Malcolm v. Taylor*, 2 Rus. & My. 431), it follows that, in order to enable the clause providing for the devise over of the gift bequeathed to Rodney, to have any operation, the failure of issue there spoken of must be a failure of issue before the bequest becomes payable absolutely; that is to say, the dying without issue *must* take place before Rodney arrives at the age of twenty-one years; both contingencies, upon which the devise over is made to depend, must occur before Rodney arrives at twenty-one (see *Clark v. Henry*, before V. C. M., in Weekly Notes, Dec. 17th, 1870, p. 259); and both did so occur, in fact, for Rodney died in his fourteenth year, and without issue.

The testator had not by his will, as yet, given anything to his daughter Sophronia (except some household furniture, which bequest he revoked by a codicil executed the next day); and to his daughter Melissa he had, as yet, only

bequeathed a charge of £25 per annum, which by the same codicil he reduced to \$25, payable to her annually, so long as she should remain single, by each of her brothers, Collingwood and Isaac Brock, in respect of the lands devised to them respectively. The testator, however, by the 9th paragraph of his will, bequeaths to his daughter Sophronia Davidson, and to his daughter Melissa, the sum of £250 of lawful currency of Upper Canada, each, to be paid to them out of the moneys he might be possessed of, or which might be due and owing to him at the time of his decease; "Sophronia's portion or legacy to be paid to her within one year after my decease, deducting therefrom all moneys already advanced by me to her, and such debts of her contracting as shall be paid by me or my executors; the portion or legacy bequeathed to Melissa *to be paid* to her when she shall marry, *or* shall have attained the age of eighteen years."

The testator's will is dated the 28th January, A.D. 1840.

It is part of the case submitted to us, that at the time the testator made this will, his son Collingwood was in his twenty-eighth year, his daughter Sophronia was married and in her twenty-seventh year, his son Isaac Brock was in his twenty-second year, his daughter Melissa in her fifteenth year, and his son Rodney just eleven years of age. It appears, then, that as to Sophronia, she being at the date of the will over age, and the ninth paragraph of the will directing the legacy bequeathed to her to be paid to her absolutely, within one year after testator's decease, her bequest was taken out of the operation of the clause providing for executory devises over, to the survivors of the testator's sons and daughters, of the gifts given to such of them as "should die before coming of lawful age, or without lawful issue."

So, in like manner, the bequest to Melissa, being made payable to her absolutely, when she should attain the age of eighteen, or should marry, whichever event should first happen, was also taken out of the operation of the same clause. Collingwood and Isaac Brock, were both of age

when the will was made: neither of them could therefore die "before coming of age;" consequently, in their cases, that condition never could be fulfilled; and if, notwithstanding, we are to construe it as a condition necessary to be fulfilled before the devise over, of the bequests to them, could take effect, then we must declare that, at the time the testator was making his will, he was providing for the survivors of his children taking the estates bequeathed to Collingwood and Isaac Brock, upon the happening of an event which he knew could not by possibility happen. But, although the contingency of Collingwood dying before coming of lawful age," could never happen, the other contingency named by the testator, "or without issue," must not be construed as pointing to an indefinite failure of issue—to a dying *at any time* without issue, so as to cut down the fee simple estate already devised to him to an estate tail. The devises over, being to the survivors of the several persons upon whom the first benefits are by the will conferred, exclude that construction, and afford a presumption which the law adopts as conclusive, that an indefinite failure of issue could not have been in the testator's contemplation, but that he intended a personal benefit to the survivors, the executory devisees. In such case the devise over must be taken to depend upon the contingency of the dying without issue taking place within the lives of the executory devisees: *Hughes v. Sayer* (1 P. Wms. 534); *Massey v. Hudson* (2 Mer. 130); *Ranelagh v. Ranelagh* (2 My. & K. 441); *Westwood v. Southey* (2 Sim. N. S. 192); *Greenwood v. Verdon* (1 K. & J. 74).

That the devises to Collingwood and Isaac Brock are fees simple in the first instance, not cut down to estates tail by the subsequent clause, but subject to executory devises in a certain contingency, is, I think, abundantly clear from the above cases, and from *Doe v. Frost* (3 B. & Al. 546); *ex parte Davies* (2 Sim. N. S. 114); *Parker v. Birks* (1 K. & J. 156), and *Coltsmann v. Coltsmann* (L. Rep. 3 E. & I. Ap. 121).

In *Parker v. Birks*, V. C. Wood said: "There is no case,

where there has been a clear and distinct gift of an estate in fee, that has been cut down to an estate tail, *in order to construe* subsequent words as creating a remainder.

Referring the period when the devise over, in the cases of the bequests to Collingwood and to Isaac Brock, should take effect, to the periods of their respectively dying without issue, at any time during the lives of the others, or of some of the other legatees, and the period when the devise over of the bequest to Rodney should take effect, to the period of his dying under age without issue, in the lifetime of the executory devisees, or of some of them, requires, no doubt, that words in the same sentence should receive a different construction, according as they apply to the different persons named in the sentence, and that some of the words must be expunged altogether as to some of the persons, as being inapplicable to them. Now it is contended, upon the part of the defendants, that this cannot be done, but that, inasmuch as it is necessary that as relates to one of the persons in the sentence, namely, Rodney, the disjunctive *or* should be read as the conjunctive *and*, it must receive the same construction as to all persons named in the same sentence, although the result should be to exclude the possibility of some of the executory devises, which the testator was professing to make, ever taking effect.

But *Forth v. Chapman* (1 P. Wms. 663), notwithstanding what is said by Lord Kenyon in *Porter v. Bradley*, (3 T. R. 143); *Crooke v. Des Vandes* (9 Ves. 197); *Campbell vs. Harding* (2 Rus. & My. 390); *Coltsmann v. Coltsmann* (L. Rep. 3 E. & I. Ap.), and many modern authorities,—establish beyond dispute that the same words in a sentence will bear a different construction according as they apply to different subjects. Freehold and personal property is frequently devised by the same sentence, subject to an executory devise upon the first taker dying without issue, at a particular time; but these words, “without issue,” receive a different construction according as they are applied to the real or to the personal estate. Upon the

same principle, I do not see why, in order that the expressed intention of a testator may prevail, words should not have a different construction according as they are applied in the same sentence to distinct persons in different positions, the one from the other. But the question here is, to what extent are we at liberty to *change* the disjunctive word *or*, which is the word which *the testator has used*, into the conjunctive *and*, which he has not used, in the sentence in question. Lord Ellenborough, in *Doe Usher v. Jessop* (12 East. 292), states the rule to be, that words in a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity will result from so construing them. The same learned Judge, in *Day v. Day* (16 East. 69), states the reason, upon which the Courts have felt justified in construing "*or*" as "*and*," in a clause of this nature, thus: "A multitude of decisions such as *Fairfield v. Morgan* (2 New. Rep. 38); *Eastman v. Baker* (1 Taunt. 174), and *Denn v. Kennys* (9 East. 366), following *Sewell v. Garrett* (reported in Moore, 422); 2 Roll. Rep. 282, and other books, have established that the disjunctive "*or*," in a devise of this kind, is to be construed as the copulative "*and*," to avoid the mischief, which would otherwise happen, of carrying over the estate if the first devisee died under the age of twenty-one, though he had left issue, when it was the apparent intention of the deviser that both events should happen, the dying under twenty-one *and* without issue, before the estate should go over."

It is, then, the necessity of avoiding a mischief which would otherwise interfere to thwart the apparent intention of the testator, to benefit the issue of the first taker, in the event of the latter dying under age, which *alone* justifies the changing the disjunctive word, which a testator has used, into the copulative, which he has not used.

Lord Wensleydale, in *Grey v Pearson* (6 H. of L. 106), says the grammatical and ordinary sense of the words used *is always to be adhered to*, unless that would lead to some absurdity or to some repugnance or inconsistency with the

rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, "*so as to avoid that absurdity and inconsistency, but no further.*" Among the golden rules for construing wills, compiled by the late Sir James Wigram, the first is: "The testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he used them in a different sense." And the fifth: "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may enquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of the disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will." And he adds, "The same, it is conceived, is true of every other disputed point respecting which it can be shewn that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words."

Now, applying these principles, we find the testator, after a devise of lands, in fee simple, to his son Collingwood and a devise of other lands, in fee simple, to his son Isaac Brock, both of whom, at the time the testator was making his will, were over twenty-one years of age, and after the bequest of a pecuniary legacy to his son Rodney, who was then only eleven years of age, declaring it to be his will that, "in the event of either of his said sons, Collingwood Forsyth, Isaac Brock Forsyth, or Rodney Forsyth, or either of his daughters, Sophronia (who was then over age, and married), or Melissa (who was then under age, and to both of whom, in a subsequent part of his will, he gives pecuniary bequests, not however subject to any executory devise, in the event of death without issue) dying before *they were* of lawful age, or without lawful issue, then and in

such case the legacies devised and bequeathed to them shall be equally divided among the surviving ones, share and share alike.

Now, although the subsequent parts of the will (making the bequests to Sophronia and Melissa) take their bequests by implication out of the operation of this clause, still, we must, as far as practicable, give effect to what the testator here has plainly said.

Looking at the position of the testator's family, we see that neither Collingwood nor Isaac Brock could die under lawful age. To construe the testator as contemplating that in their cases the executory devise over of the bequests to them should depend upon a dying under age, would involve an absurdity, incongruity, and inconsistency which we must avoid. But this is not the only event upon the happening of which the testator provides that the benefit given to Collingwood shall go over to the testator's other children surviving Collingwood; for he adds, "*or without issue, then,*" &c., &c.

Now, the natural sense of this language is, that if either of these events occur, the devise over shall take effect. This is the sense in which we must read the language, until and unless an absolute necessity arises for reading *or* as *and*, to avoid a mischief which would defeat the testator's intended bounty to the issue of Collingwood, in case he should die under age, leaving issue. But, as Collingwood was already twenty-seven years of age, no such mischief could occur, and therefore no justification or excuse can intervene to warrant our changing the disjunctive *or*, which the testator has used, into the conjunctive *and*, which he has not used, in so far as the devise to Collingwood is concerned. So neither in the case of the devise to Isaac Brock, who was also over age when testator was making his will: the necessity does not arise until we come to deal with the bequest to Rodney: there, it is admitted, it does arise.

To prevent the mischief which might occur in Rodney's case, but for that purpose only, and to that extent, we are

justified in interposing, but "*no further*," in the words of Lord Wensleydale; and to avoid absurdity, incongruity, and inconsistency, we are obliged, in so far as Collingwood and Isaac Brock are concerned, to read the clause as if the words "*under age*" were not used in reference to them, leaving those words which could not by possibility have any application to them, to apply to those only of testator's children to whom, being under age at the time, they could apply.

Having regard, then, to the whole will, and to the fact that, although the bequests to Sophronia and Melissa are taken out of the operation of the executory devise clause, their names remain in that clause, as entitled to partake in any benefit which survivorship may give them in such of the bequests as may come within the operation of the executory devise clause; and in order to give full effect to every word in the will, in its ordinary sense, as far as possible having regard to the persons to whom they can by possibility apply, and in view of the respective ages of the devisees; and modifying the language only so far as to avoid absurdity, incongruity, and inconsistency, the clause in question must, I think, be read thus: "And in the event of my son Collingwood (he being already of age) dying without lawful issue, and in the event (in like manner) of my son Isaac Brock dying without lawful issue, and in the event of my son Rodney dying before coming of age, and without lawful issue, then and in such case the legacies devised and bequeathed to my said sons respectively, shall be equally divided among such of them, and of my said daughters, Sophronia and Melissa, as shall be the surviving ones of my said children.

I am of opinion, therefore, that when Collingwood died without issue, the executory devise of the gift to him took effect in favour of the survivors, who took in fee, not merely in virtue of our Statute, 22 Vic. ch. 82, sec. 12, but as taking *the same estate* which had been devised to Collingwood: *Simpson v. Ashworth* (6 Beav. at p. 417).

Between this construction and one which shall excise

from the will altogether the clause in question, I see no alternative, and I adopt, therefore, the former, as most consistent with the general frame of the will, and what I take to be an apparent intention of the testator to benefit the survivors named of his children, in the event of the first takers, Colingwood and Isaac Brock, dying without issue at the time of their death, leaving any of the other children named them surviving.

GALT, J., being a defendant in the case, took no part in the judgment.

Judgment for plaintiff.

BURGESS V. BURROWS.

Will—Intestacy—Fee simple—Life estate—Construction.

A testator devised his property to his wife for life, provided she remained unmarried; but if she married, it was at once to be equally divided among his children: if, however, she should continue his widow, and be guilty of no misconduct, then it was to be at her disposal, without the hindrance or molestation of any person whomsoever; with a final declaration that it was not to be disposed of or rented during the devisee's life. The widow remained unmarried.

Held, per Hagarty, C. J., that the widow had no such power; that there was either an intestacy, as to the fee, on her death, or the children took on her death, as they were to take on her marrying again; and that the latter was, on the whole, the truest construction.

Per Gwynne and Galt, JJ., that the widow took either a fee simple estate, or an estate for life, with power to dispose of the fee.

Ejectment by plaintiff, as heir-at-law of one William Burgess, deceased.

The question turned upon the construction of the will of the said Burgess, which was dated 22nd July, A.D. 1841, and was as follows: "First, I give and bequeath unto my beloved wife, Mary Burgess, the whole of my landed property, goods, chattels, household furniture; in a word, all that I possess, by her freely to be enjoyed as long as she lives in this present world, provided she remains unmarried; but if in case she should marry, the whole of said property is to be equally divided between

my beloved children, viz., Eliza Keys, Pat Burgess, William Burgess, Marcella Phillips, and Nathaniel Burgess, at such time and place as she may get married. Secondly: If in case my beloved wife, Mary, should remain unmarried, and be guilty of no misconduct during her present life, then the whole of the said property is to be at her disposal, without the hindrance or molestation of any person whomsoever. Thirdly: It is to be understood that the landed property now in possession cannot be disposed of or otherwise rented or let out during my life, or my wife's, but to be retained in possession so long as any or either of us shall live in this present life. I further give unto my beloved children, viz., Eliza Keys, Pat Burgess, William Burgess, Marcella Phillips, and Nathaniel Burgess, (all his children, including the heir-at-law,) the sum of five shillings each, to be levied out of the said property in seven years of the time of my decease." He made his wife Mary sole executrix of his will.

A verdict was rendered for the plaintiff, the testator's heir-at-law, the testator having died in 1844, with leave reserved to the defendant to move to set it aside, and to enter a nonsuit or verdict for defendant, if the Court should be of opinion that the heir-at-law took nothing.

Accordingly, in Michaelmas Term last, *Richards*, Q. C., obtained a rule *nisi*, to which, this Term, *Harrison*, Q. C., shewed cause, his contention being that the will made no provision for the event which had happened, namely, the death of the widow, she not having married again, and that therefore the whole estate, upon her death, descended to the testator's heir-at-law, the plaintiff; and he referred to *Drewry v. Weatherhead*, 11 Ex. 230; *Booley v. Roberts*, 11 A. & E. 1,000; *Maxwell's Will*, 24 Beav. 246; *Doe Thorley v. Thorley*, 10 Ex. 438.

Richards, Q. C., contra, contended that the widow took either an estate in fee simple, or a life-estate, with a power of disposing of the fee by will, and that in either case, as she had disposed of it by will, the plaintiff took nothing

and could recover. He cited *Doe Anderson v. Hamilton*, 8 U. C. 302; *Thomlinson v. Dighton*, 10 Mod. 31, 71, S. C. 1 P. W. 149; *Goodtitle v. Otway*, 2 Wils. 6; *Hoy v. Master*, 6 Si. 568.

GWYNNE, J.—If the will had stopped at the end of the first paragraph, it would be the case of a devise to the testator's widow for life, if she should so long continue his widow; but if she should marry then over. In that case the devise over would, I apprehend, take effect on the determination of the widow's estate, whether by marriage or death: 1 Jar. Wills, 761. In *Grey v. Pearson* (6 H. of L.) Lord St. Leonards, at p. 90, gives the case as an example of the Court supplying words where a clear intention is exhibited by a testator, which he has in words failed to provide for. He says: "So, when a testator's intention is clear, but he fails in words to provide for the precise event which happens, the Courts supply the words; for example, a gift to a woman during her life, if she shall so long continue his widow, and, in case she marry, to A in fee, A will take upon either the death or marriage of the widow."

If then, the first paragraph had stood alone, I think the plaintiff would have been entitled to an undivided fifth part, *not* to the whole. But the question arises whether the second paragraph does not shew that the testator was not leaving the event of his widow's death, without having married again, unprovided for, and therefore that on that event happening, it is not necessary to supply words to the first paragraph, as said by Lord St. Leonards, "to provide for the precise event which has happened." The testator himself, as it appears to me, has provided, in the second paragraph, for the precise event which has happened. Having provided for the estate going over to all his children, including the heir-at-law, as tenants in common in fee, in the event of his widow marrying again, he proceeds to provide specially for the event of her continuing his widow during her life, and he declares it to be his will, that in the event of his wife, Mary, remaining unmarried,

adding, "and being guilty of no misconduct during her life," *then*—that is, *in that event*—namely, in the event of her continuing unmarried until her death, "the whole of the said property is to be at her disposal without the hindrance or molestation of any person whomsoever." Mr. Harrison, in support of an intestacy in the event which has happened, contended that these words, "to be at her disposal," &c., are to be limited to the period of the duration of the widow's life. This, however, plainly could not have been the intention of the testator, for the very next paragraph of the will exhibits a clear intent to restrain the widow's power of disposal during her life; for he there declares his will to be, that "it is to be understood that the landed property now in possession cannot be disposed of or otherwise rented or let out during my life, or my wife's, but to be retained in possession so long as any or either of us shall live in this present life." Moreover, the word "*then*," which defines the time when, or the event upon the happening of which the whole of the said property should be at the widow's disposal, is connected with the words, "in case my wife shall remain unmarried during her present life," which words cover the whole period of her life, "*then* the property shall be at her disposal without the hindrance or molestation of any person whomsoever;" words large enough to comprehend the heir and those to whom he had devised his estate, in the event of the widow marrying again.

Upon the authority of all the cases cited, I am of opinion that no estate has *descended* to the heir-at-law, but that the widow took, under the will, either a fee simple estate in the property in question, or an estate for life with a power of disposing of the fee if she should not marry again, but both estates subject to being divested in case she should marry again; in either of which cases the heir is excluded, as it is admitted that, if she took only a life estate, coupled with a power of disposing of the fee, she has exercised the power by her will. But whether the case is to be governed by *Newlan v. Walsh* (4 DeG. & S. 585),

and in *Re Maxwell's Will* (24 Beav. 246), as contended for by Mr. *Richards*, so as to give the widow a life-estate, with a power of disposal over the fee, or by *Goodright* on the demise of *Drewry v. Barron* (11 East. 224); *Doe Thorley v. Thorley* (10 East. 438), and *Tomlinson v. Dighton* (1 P. Wms. 154), and that class of cases, so as to give the widow a fee simple estate, subject to being defeated and going over to testator's children in the event of the widow marrying again, as contended by Mr. *Richards* in the other view presented by him, I express no opinion; because, as I think, in the events which have happened, that the heir takes nothing, the other question does not arise upon this record, nor are there any persons before the Court between whom the point can be decided if there should be a contention as to which of those estates the widow took.

What was passing in the testator's mind appears to me to have been, to take care that, if his widow should marry again, the estate should go immediately to all his children alike in fee; but if she should continue his widow, he was willing to trust her and to leave the children to her care, they all enjoying the homestead together, and to trust to such disposition as she should make of the fee, either under a power to dispose of it, or in virtue of a seisin devised to her. For the purpose of this action it is sufficient to say that the plaintiff is not entitled to prevail. The rule, therefore, must be made absolute for entering a nonsuit.

GALT, J.—It is unnecessary, for the decision of this case, to decide whether the devisee, in the will mentioned, took an estate for life, with the power of disposition, or an estate in fee, because in either event the plaintiff fails. The testator, in the first place, devises an estate for life to his wife, with a proviso that she should remain unmarried. It then provides that in case she married, the property should at once be equally divided between his children. It then proceeds: "Secondly, if in case my beloved wife, Mary, should remain unmarried, and be guilty of no mis-

conduct during her present life, then the whole of the said property is to be at her disposal, without the hindrance or molestation of any person whomsoever." It then concludes with an express declaration that the property is not to be disposed of or rented during the life of the devisee. The widow remained unmarried. The plaintiff claims as heir-at-law.

It appears to me that it was not the intention of the testator to die intestate, in case of his widow remaining unmarried, for the following reasons: he devised an estate for life; then follows a clause devising the property over, in case of the forfeiture of that estate; then a clause stating that if the widow remained unmarried, the estate was to be at her disposal; and lastly, a clause prohibiting any disposition during her life. We are bound, as far as we can, to give effect to each clause of the will.

HAGARTY, C. J.—I feel great difficulty in forming a clear opinion as to the testator's meaning. I am glad that my learned brothers have found their way to a definite conclusion.

The great doubt I feel is, that the clause relied on as giving the widow the disposing power, seems to me as reiterating, as it were, the right to the life-estate previously given, which, on marriage, was to go over to the children. After the devise over it proceeds, that in case she remains unmarried, and be not guilty of misconduct during life, then the whole of the property is to be at her disposal without any one's hindrance or molestation. I feel much doubt as to this second clause. It seems as if testator said, in popular phrase: "I give it to you, freely to be enjoyed during your life, provided you remain unmarried; but if you marry, it goes to our children. But if you don't marry, and behave properly during your life, it is to be at your disposal, without anybody's interference."

Then comes the clause that the landed property cannot be disposed of, rented, or let out, during the wife's life, but must be retained in possession so long as she shall live.

He then shews he has not forgotten his children, but gives each, by name, 5s., to be levied off the property in seven years from his death. The devise over to his five children, by name, would be certainly against the idea that he ever contemplated his eldest son taking the estate, to the exclusion of the rest, on failure of the interest given to the widow.

If he intended to give the fee simple to his wife, he would hardly have added the restraint on alienation. She is to hold the land in possession during her life. My learned brothers construe the words, "to be at her disposal," as giving a power of appointment by will. Yet, giving this wide effect, to be "at her *disposal*," does not very well agree with the restraining words, "cannot be *disposed* of." If "disposal" means devising by will, then "cannot be disposed of" may be argued as preventing such a devise, unless we read the latter words as meaning, that she may make a disposition provided it does not *take effect* during her life, though necessarily made during her life. This seems to me rather too artificial a construction for words so inexact.

I do not think the testator *intended* to give any preference to his heir-at-law; nor, as matter of speculation, that he intended to die intestate as to any part of his estate.

We have also to consider whether the devise over on her marrying again, can take effect on the determination of the life estate by her death.

In *Brown v. Hammond* (1 Johns. 210) the testator devised certain real estate, and all his remaining personal estate, to his wife, for her sole and separate use, so long as she continued to be his widow; but if she should marry again after his decease, his will was, that his property should be sold, and the proceeds equally divided between his children, their heirs, &c., as tenants in common. The widow never married. It was contended there was an intestacy. Sir W. Page Wood held: "I am concluded by the authorities, which have determined that a devise or bequest over, though in terms made upon the marriage of

the donee of the preceding estate, is to be extended by implication so as to take effect upon the determination of that estate by death."

Gordon v. Adolphus (3 Bro. P. C. 306) is to a like effect.

In *Luxford v. Cheeke* (3 Lev. 125), as condensed by Lord St. Leonards in *Abbott v. Middleton* (7 H. L. 104), "A man devised all to his wife for her life, if she should not marry, but if she did marry, that Humphrey (that is, his son), presently after her decease, enter, have, hold, and enjoy all the land, to him and the heirs male of his body, remainder to Robert and the heirs male of his body, remainder to Anthony and the heirs male, &c. The wife did not marry. The question was whether the remainder over took effect. The Court resolved that the land was entailed by this will, for by the whole scope of the will it appears plainly the deviser intended an entail, with several remainders over, and rather than this intent shall be defeated, the words shall be read and taken thus, 'If she marry, Humphrey to enter presently; and if she do not marry, then Humphrey shall have, hold, and enjoy them, to him and the heirs male of his body, with remainder over.'"

Lord St. Leonards said: "She did not marry, and it was held that the gift over comprised the very event which was not provided for, so that the property was held to go over, though she did not marry. It was given to her for life if she do not marry, but if she do marry, then presently after her decease it was to go over. She did not marry; yet, though it was only given over if she did marry, it was held to be a good gift over, and that intention was collected only from the limitation that if she do marry the remainder over was to take effect at once."

Lord Hardwicke's judgment, in *Sheffield v. Lord Orrery* (3 Atk. 282), is opposed to the existence of any such general rule as is stated in Jarman; and Sir W. Page Wood, V. C., in *Brown v. Hammond*, speaks of *Sheffield v. Lord Orrery* as determined on its own special circumstances.

Mr. Jarman thus states the rule: "An exception to this rule, however, may seem to exist in a case which deserves especial attention on account of the frequency of its occurrence, namely, where a testator makes a devise to his widow for life, if she shall so long continue a widow, *and, if she shall marry*, then over, in which the established construction is that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect, at all events, on the determination of the estate, whether by marriage or death."

Luxford v. Cheeke is cited as the leading authority for this doctrine, but Mr. Jarman misquotes the words of the devise: "presently after her marriage" should be, as reported in 3 Levinz, "presently after her decease."* Again: "On the whole, the distinction would seem to be, that where the circumstance of not marrying again is interwoven into the original gift, the testator, having thus, in the first instance, created an estate, *durante viduitate*, must be considered, when he subsequently refers to the marriage, to describe the determination, *by any means*, of that estate, and consequently the gift over is a vested remainder expectant thereon. On the other hand, when a testator first gives an absolute estate for life, and then engrafts thereon a devise over, to take effect on the marriage of such devisee for life, the conclusion is that the devise over is not to take effect unless the contingency happens."

In the case before us it may be said that "the circumstance of not marrying again is interwoven into the original gift."

The distinction in this case, and those just noticed, lies chiefly in the subsequent words, providing, as it were, for the event of her remaining unmarried, and my learned brothers consider that a power is given to her to dispose by will.

* But see *Brown v. Catter*, Sir T. Raymond, 427, a case on the same will, the words being somewhat different.

I have already pointed out my difficulty in accepting this view, and I am unable to hold that the testator meant to give her any power to either alien or devise the estate.

The devise here is not an absolute estate for life, with a devise over engrafted thereon, to take effect on the marriage, but it is an estate, in my judgment, *durante viduitate* (see *Doe v. Freeman*, 1 T. R. 392); and unless the subsequent words give a power of disposition by will, it seems to me the testator's children take, on their mother's death, as they would have taken on her marriage.

The bequest of 5s. to each of the children does not, in my view, affect the case. It is to be paid to them in seven years from his death, but the estate might become theirs absolutely long before that time, by the marriage of their mother.

On the whole, I am unable to agree with the rest of the Court. I think we must either read the will as devising the estate over to the children on the termination of the estate given during widowhood either by marriage or death, or that there is an intestacy. In either case the plaintiff would be entitled to the *postea*.

With much hesitation, I give my opinion in favour of the former position, viz., that all the named children took the estate on their mother's death.

Rule absolute to enter nonsuit.

Regulae Generales.

HILARY TERM, 1871.

GENERAL RULES

MADE BY

THE HONORABLE WILLIAM BUELL RICHARDS, *Chief Justice of the Court of Queen's Bench*, THE HONORABLE JOHN GODFREY SPRAGGE, *Chancellor of Ontario*, and THE HONORABLE JOHN HAWKINS HAGARTY, *Chief Justice of the Court of Common Pleas*, the Judges for the time being for the trial of Election Petitions in the Province of Ontario, pursuant to the Controverted Elections Act of 1871.

I.

The Presentation of an Election Petition shall be made by leaving it at the office of the Clerk of the Crown in the Court of Queen's Bench, who, or his clerk shall (if required) give a receipt, which may be in the following form :

Received on the day at the office
of the Clerk of the Crown, a petition touching the Election
of A. B., a member for purporting to be signed
by (*insert the name of Petitioners.*)

C. D., Clerk.

With the Petition shall also be left a copy thereof for the said Clerk of the Crown to send to the Returning Officer, pursuant to section 7 of the Act.

II.

An Election Petition shall contain the following statements :

1. It shall state the right of Petitioner to petition within section 5 of the Act.

2. It shall state the holding and result of the Election, and shall briefly state the facts and grounds relied on to sustain the prayer.

III.

The Petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed of drawing or copying any Petition not substantially in compliance with this Rule, unless otherwise ordered by the Court or a Judge.

IV.

The Petition shall conclude with a Prayer, as for instance, that some specified person should be declared duly returned or elected, or that the Election should be declared void, or that a return may be enforced (as the case may be,) and shall be signed by all the Petitioners.

V.

The following form, or one to the like effect, shall be sufficient :

In the Queen's Bench.

THE "CONTROVERTED ELECTIONS ACT OF 1871."

Election for (*state the place*) holden on the day of
A.D.

The Petition of A, of (*or of A, of and*
of B, of , *as the case may be,*) whose names are
subscribed.

1. Your Petitioner A is a person (*or if more than one, say, your Petitioners are persons*) who voted (*or had a right to vote, as the case may be*) at the above Election or claims to have had a right to be returned at the above Election, or was a candidate at the above Election).

VIII.

When the Respondent in a Petition under the Act, complaining of an undue return, and claiming the seat for some person, intends to give evidence to prove that the Election of such person was undue, pursuant to the 56th section of the Act, such Respondent shall, six days before the day appointed for trial, deliver to the Clerk of the Crown, and also at the address, if any, given by the Petitioner, a list of the objections to the Election upon which he intends to rely. And the Clerk of the Crown shall allow inspection and office-copies of such lists to all parties concerned; and no evidence shall be given by a Respondent of any objection to the Election not specified in the list, except by leave of the Court or Judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered.

IX.

With the Petition, Petitioners shall leave at the office of the Clerk of the Crown a writing, signed by them or on their behalf, giving the name of some person entitled to practise as an attorney, or whom they authorize to act as their Agent, or stating that they act for themselves, as the case may be, and in either case giving an address, within the City of Toronto, at which notices addressed to them may be left; and if no such writing be left or address given, then notice of objection to the recognizances and all other notices and proceedings may be given by sticking up the same at the office of the Clerk of the Crown.

X.

Any person returned as a member may at any time after he is returned, send or leave at the office of the Clerk of the Crown, a writing signed by him or on his behalf, appointing a person entitled to practise as an Attorney to act as his Agent in case there should be a petition against him, or stating that he intends to act for himself, and in either case

giving an address within the City of Toronto, at which notices may be left, and in default of such writing being left in a week after service of the petition, notices and proceedings may be given and served respectively by sticking up the same at the office of the Clerk of the Crown.

XI.

The Clerk of the Crown shall keep a book or books at his office in which he shall enter all addresses and the names of agents given under either of the preceding rules which book shall be open to inspection by any person during office-hours, without payment of any fee.

XII.

The Clerk of the Crown shall, upon the presentation of the petition, forthwith send a copy of the petition to the Returning Officer pursuant to section 7, of the Act, and shall therewith send the name of the Petitioner's Agent, if any, and of the address, if any, given as prescribed, and also of the name of the Respondent's Agent, and the address, if any, given as prescribed, and the Returning Officer shall forthwith publish those particulars along with the petition.

The cost of publication of this and any other matter required to be published by the Returning Officer, shall be paid by the Petitioner or person moving in the matter, and shall form part of the general costs of the petition.

XIII.

The time for giving notice of the presentation of a petition and of the nature of the proposed security, shall be five days, exclusive of the day of presentation.

XIV.

Where the Respondent has named an agent or given an address, the service of an Election Petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such a time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the Respondent, unless a Judge on an application made to him not later than five days after the petition is presented on affidavit shewing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the Respondent, including, when practicable, service upon an agent for election expenses, in which case the Judge may order that what has been done shall be considered sufficient service subject to such conditions as he may think reasonable.

XV.

In case of evasion of service, the sticking up in the office of the Clerk of the Crown a notice of the petition having been presented, stating the Petitioner, the prayer, and the nature of the proposed security, shall be deemed equivalent to personal service, if so ordered by a Judge.

XVI.

The deposit of money by way of security for payment of costs, charges, and expenses payable by the Petitioner, shall be made by payment into the Bank of British North America, in Toronto, to an account to be opened there by the description of "The Controverted Elections Act of 1871 Security Fund," which shall be vested in, and drawn upon from time to time by the Chief Justice of the Queen's Bench for the time being (by checks countersigned by the Clerk of the Crown), for the purposes for which security is required by the said Act, and a Bank receipt or certificate for the same shall be forthwith left at the office of the Clerk of the Crown.

XVII.

All claims at law or in equity to money deposited or to be deposited in the Bank for payment of costs, charges, and expenses payable by the Petitioners pursuant to the said 16th Rule, shall be disposed of by the Court of Queen's Bench or a Judge.

XVIII.

Money so deposited shall, if, and when the same is no longer needed for securing payment of such costs, charges, and expenses, be returned or otherwise disposed of as justice may require, by rule of the Court of Queen's Bench or order of a Judge.

XIX.

Such rule or order may be made after such notice of intention to apply, and proof that all just claims have been satisfied or otherwise sufficiently provided for as the Court or Judge may require.

XX.

The rule or order may direct payment either to the party in whose name the same is deposited, or to any person entitled to receive the same.

XXI.

Upon such rule or order being made, the amount may be drawn for by the Chief Justice of the Queen's Bench for the time being, by check countersigned as aforesaid.

XXII.

The Clerk of the Crown shall file such receipt or certificate, and keep a book open to inspection of all parties concerned, in which shall be entered from time to time the amount, and the Petition to which it is applicable, which book may be inspected without payment of any fee.

XXIII.

The recognizance as security for costs may be acknowledged before a Judge at Chambers, or the Clerk of the Crown, or a Justice of the Peace in the Country.

There may be one recognizance acknowledged by all the sureties, or separate recognizances by one or more (not exceeding four), as may be convenient.

XXIV.

The recognizance shall contain the name and usual place of abode of each surety, with such sufficient description as shall enable him to be found or ascertained, and may be as follows:—

Be it remembered that on the day of in the year of our Lord, 18 , before me (*name and description*) came A. B. of (*name and description as above prescribed*) and acknowledged himself (*or severally acknowledged themselves*) to owe to our Sovereign Lady the Queen the sum of eight hundred dollars (*or the following sums*) [that is to say] the said C. D. the sum of \$, the said E. F. the sum of \$, the said G. H. the sum of \$, and the said J. K. the sum of \$, to be levied on his (*or their respective*) goods and chattels, lands, and tenements, to the use of our Sovereign Lady the Queen, her heirs and successors.

This condition of this recognizance is that if (*here insert the names of all the Petitioners, and if more than one add, or any of them*) shall well and truly pay all costs, charges, and expenses, in respect of the Election Petition, signed by him (*or them*) relating to the (*here insert the name of the Electoral Division*) which shall become payable by the said Petitioner (*or Petitioners or any of them*) under the "Controverted Elections Act of 1871," to any person or persons, then this recognizance to be void, otherwise to stand in full force.

(Signed) (*Signatures of Securities*).

Taken and acknowledged by the above named (*names of sureties*) on the day of at before me
C. D.

A Justice of the Peace (*or as the case may be*.)

XXV.

The recognizance or recognizances shall be left at the office of the Clerk of the Crown by or on behalf of the Petitioner, in like manner as before prescribed for the hearing of a Petition, forthwith after being acknowledged.

XXVI.

The time for giving notice of any objection to a recognizance, under the 8th section of the Act, shall be within five days from the date of service of the notice of the petition and of the nature of the security, exclusive of the day of service.

XXVII.

An objection to the recognizance must state the ground or grounds thereof, as that the sureties, or any, and which of them are insufficient, or that a surety is dead, or that he cannot be found, or that a person named in the recognizance has not duly acknowledged the same.

XXVIII.

An objection made to the security shall be heard and decided by the Clerk of the Crown, subject to appeal within five days to a Judge, upon summons taken out by either party to declare the security sufficient or insufficient.

XXIX.

Such hearing and decision may be either upon affidavit or personal examination of witnesses, or both, as the Clerk of the Crown or Judge may think fit.

XXX.

If by order made on such summons the security be declared sufficient, its sufficiency shall be deemed to be established within the meaning of the 9th section of the said Act, and the petition shall be at issue.

XXXI.

If by order made on such summons an objection be allowed, and the security be declared insufficient, the Clerk of the Crown or Judge shall in such order state what amount he deems requisite to make the security sufficient, and the further prescribed time to remove the objection by deposit shall be within five days from the date of the order, not including the day of the date, and such deposit shall be made in the manner already prescribed.

XXXII.

The costs of hearing and deciding the objections made to the security given shall be paid as ordered by the Clerk of the Crown or Judge, and in default of such order shall form part of the general costs of the Petition.

XXXIII.

The costs of hearing and deciding an objection upon the grounds of insufficiency of a surety or sureties, shall be paid by the Petitioner, and a clause to that effect shall be inserted in the order declaring its sufficiency or insufficiency, unless at the time of leaving the recognizance with the Clerk of the Crown there be also left with him an affidavit of the sufficiency of the surety or sureties, sworn by each surety before a Justice of the Peace, which affidavit any Justice of the Peace is hereby authorized to take, or before some person authorized to take affidavits, in some one of the Superior Courts, that he is seised or possessed of real or personal estate, or both, above what will satisfy his debts, of the clear value of the sum for which he is bound by his recognizance, which affidavit may be as follows :

In the Queen's Bench.

“CONTROVERTED ELECTIONS ACT OF 1871.”

I, A. B., of (*as in recognizance*) make oath and say, that I am seised or possessed of real (*or personal*) estate, above what will satisfy my debts, of the clear value of \$

Sworn, &c.

XXXIV.

The order of the Clerk of the Crown for payment of costs shall have the same force as an order made by a Judge, and may be made a Rule of the Court of Queen's Bench, and enforced in like manner as a Judge's order.

XXXV.

The Clerk of the Crown shall make out the Election list. In it he shall insert the names of the Agents of the Peti-

tioners and Respondent and the addresses to which notices may be sent, if any. The list may be inspected at the office of the Clerk of the Crown at any time during office hours, and shall be put up for that purpose upon a notice board appropriated to proceedings under the said Act, and headed "Controverted Elections Act of 1871."

XXXVI.

The time and place of the trial of each Election Petition shall be fixed by the Judges on the rota, and notice thereof shall be given in writing by the Clerk of the Crown by sticking notice up in his office, sending one copy by the post to the address given by the Petitioner, another to the address given by the Respondent, if any, and a copy by the post to the Sheriff, fifteen days before the day appointed for the trial. The Sheriff shall forthwith publish the same in the Electoral Division.

XXXVII.

The sticking up of the notice of trial at the office of the Clerk of the Crown shall be deemed and taken to be notice in the prescribed manner within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of, or relating to, the copy or copies thereof to be sent as already directed.

XXXVIII.

The notice of trial may be in the following form:

"CONTROVERTED ELECTIONS ACT OF 1871."

Election Petition of (*name the Electoral Division*),—Take notice that the above Petition (*or Petitions*), will be tried at on the day of and on such other subsequent days as may be needful.

Dated the day of

By order.

(Signed), A. B.,

*Clerk of the Crown of the Court of
Queen's Bench.*

XXXIX

That notice of the time and place of the trial of each Election Petition shall be transmitted by the Clerk of the Crown to the Clerk of the Crown in Chancery, and that the Clerk of the Crown in Chancery shall, on or before the day fixed for the trial, deliver, or caused to be delivered, to the Registrar of the Judge who is to try the Petition, or his Deputy, the Poll Books, for which the Registrar or his Deputy shall give, if required, a receipt; and that the Registrar or his Deputy shall keep in safe custody the said Poll Books until the trial is over, and then return the same to the Crown Office.

XL.

A Judge may from time to time, by order made upon the application of a party to the Petition, or by notice in such form as the Judge may direct to be sent to the Sheriff, postpone the beginning of the trial to such day as he may name, and such notice, when received, shall be forthwith made public by the Sheriff.

XLI.

In the event of the Judge not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall, *ipso facto*, stand adjourned to the ensuing day, and so from day to day.

XLII.

No formal adjournment of the Court for the trial of an Election Petition shall be necessary, but the trial is to be deemed adjourned, and may be continued from day to day until the enquiry is concluded; and in the event of the Judge, who begins the trial, being disabled by illness or otherwise, it may be recommenced and concluded by another Judge.

XLIII.

The application to state a special case may be made by rule in the Court of Queen's Bench, when sitting, or by a summons before a Judge at Chambers, upon hearing the parties.

XLIV.

The title of the Court of Record held for the trial of an Election Petition may be as follows :

Court for the trial of an Election Petition for the (*name the Electoral Division*), between , Petitioner, and Respondent, and it shall be sufficient so to entitle all proceedings in that Court.

XLV.

An officer shall be appointed for each Court for the trial of an Election Petition, who shall attend at the trial in like manner as the Clerks of Assize and of arraigns attend at the Assizes.

Such officer may be called the Registrar of that Court. He by himself, or in case of need his sufficient Deputy, shall perform all the functions incident to the officer of a Court of Record, and also such duties as may be prescribed to him.

XLVI.

The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand.

XLVII.

The order of a Judge to compel the attendance of a person as a witness may be in the following form :

Court for the trial of an Election Petition for (*complete the title of the Court*), the day of

To A. B., (*describe the person*),—You are hereby required to attend before the above Court at (*place*), on the day of , at the hour of (*or forthwith as the case may be*), to be examined as a witness in the matter of the said Petition, and to attend the said Court until your examination shall have been completed.

As witness my hand.

A. B.,

Judge of the said Court.

XLVIII.

In the event of its being necessary to commit any person for contempt, the warrant may be as follows :—

At a Court holden on at for the trial of an Election Petition for the (*here name the Electoral Division*) before the Honorable and one of the Judges for the time being for the trial of Election Petitions, pursuant to the “Controverted Elections Act of 1871.”

Whereas, A. B., has this day been guilty, and is by the said Court adjudged to be guilty, of a contempt thereof. The said Court does, therefore, sentence the said A. B., for his said contempt to be imprisoned in the Gaol for calendar months, and to pay to our Lady the Queen a fine of \$, and to be further imprisoned in the said Gaol until the said fine be paid. And the Court further orders that the Sheriff of the said County (*or as the case may be*), and all constables and officers of the Peace of any County or place where the said A. B., may be found, shall take the said A. B. into custody, and convey him to the said Gaol, and there deliver him into the custody of the Gaoler thereof to undergo his said sentence. And the Court further orders the said Gaoler to receive the said A. B., into his custody, and that he shall be detained in the said Gaol in pursuance of the said sentence.

Signed the day of A.D.

(*To be signed by the Judge*).

XLIX.

Such warrant may be made out and directed to the Sheriff or other person having the execution of process of the Superior Courts, as the case may be, and to all constables and officers of the Peace of the County or place where the person adjudged guilty of contempt may be found, and such warrant shall be sufficient without further particularity, and shall and may be executed by the persons to whom it is directed, or any or either of them.

L.

All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a Judge, who shall have the same control over the proceedings under the "Controverted Elections Act of 1871," as a Judge at Chambers in the ordinary proceedings of the Superior Courts, and such questions and matters shall be heard and disposed of by one of the Judges upon the rota, if practicable, and if not, then by any Judge at Chambers.

LI.

Notice of an application for leave to withdraw a Petition shall be in writing and signed by the Petitioners or their agent. It shall state the ground on which the application is intended to be supported.

The following form shall be sufficient:—

"CONTROVERTED ELECTIONS ACT OF 1871."

(*Name the Electoral Division*) of Petition of
(*state petitioners*) presented day of

The Petitioner proposes to apply to withdraw his Petition upon the following ground (*here state the ground*), and prays that a day may be appointed for hearing his application.

Dated this day of
(Signed).

LII.

The notice of application for leave to withdraw shall be left at the office of the Clerk of the Crown.

LIII.

A copy of such notice of the intention of the Petitioner to apply for leave to withdraw his Petition shall be given by the Petitioner to the Respondent, and to the Returning Officer, who shall make it public in the Electoral Division

to which it relates, and shall be forthwith published by the Petitioner in at least one newspaper published or circulating in the place, if any.

The following may be the form of such notice :—

“CONTROVERTED ELECTIONS ACT OF 1871.”

In the Election Petition for in which is
Petitioner and Respondent. Notice is hereby given
that the above Petitioner has on the day of
lodged at the office of the Clerk of the Crown, notice of an
application to withdraw the Petition, of which notice the
following is a copy (*set it out.*) And take notice that, by
the rule made by the Judges, any person who might have
been a petitioner in respect of the said Election may, with-
in five days after publication by the Returning Officer of
this notice, give notice in writing of his intention on the
hearing to apply for leave to be substituted as a Petitioner
(Signed).

LIV.

Any person who might have been a Petitioner in respect of the Election to which the Petition relates, may, within five days after such notice is published by the Returning Officer, give notice in writing, signed by him on his behalf, to the Clerk of the Crown, of his intention to apply at the hearing to be substituted for the Petitioner, but the want of such notice shall not defeat such application, if in fact made at the hearing.

LV.

The time and place for hearing the application shall be fixed by a Judge, and whether before the Court of Queen's Bench or before a Judge, as he may deem advisable, but shall not be less than a week after the notice of the intention to apply has been given to the Clerk of the Crown as hereinbefore provided, and notice of the time and place appointed for the hearing shall be given to such person or persons, if any, as shall have given notice to the Clerk of

the Crown of an intention to apply to be substituted as Petitioners, and otherwise in such manner and at such time as the Judge directs.

LVI.

Notice of abatement of a Petition, by death of the Petitioner or surviving Petitioner, under section 40 of the said Act, shall be given by the party or person interested in the same manner as notice of an application to withdraw a Petition and the time within which application may be made to Court or a Judge, by motion or summons at Chambers, to be substituted as a Petitioner, shall be one calendar month, or such further time as, upon consideration of any special circumstance, the Court or a Judge may allow.

LVII.

If the Respondent dies, or if the Legislative Assembly have resolved that his seat is vacant, any person entitled to be a Petitioner under the Act in respect of the election to which the petition relates, may give notice of the fact in the Electoral Division by causing such notice to be published in at least one newspaper published or circulating therein, if any, and by leaving a copy of such notice signed by him or on his behalf with the returning officer, and a like copy with the Clerk of the Crown.

LVIII.

The manner and time of the Respondent giving notice to the Court that he does not intend to oppose the Petition, shall be by leaving notice thereof, in writing, at the office of the Clerk of the Crown, signed by the Respondent six days before the day appointed for trial, exclusive of the day of leaving such notice.

LIX.

Upon such notice being left at the office of the Clerk of the Crown, he shall forthwith send a copy thereof by the post to the Petitioner or his Agent, and to the Sheriff, who shall cause the same to be published in the Electoral Division.

LX.

The time for applying to be admitted as a Respondent in either of the events mentioned in the 41st section of the Act, shall be within ten days after such notice is given as hereinbefore directed, or such further time as the Court or Judge may allow.

LXI.

Costs shall be taxed by the Clerk of the Crown, or at his request, by any Master of a Superior Court, upon the rule of Court or Judge's order by which the costs are payable, and costs when taxed may be recovered by execution issued upon the rule of Court ordering them to be paid; or, if payable by order of a Judge, then by making such order a Rule of Court in the ordinary way, and issuing execution upon such rule against the person by whom the costs are ordered to be paid, or in case there be money in the bank available for the purpose, then to the extent of such money by order of the Chief Justice of the Queen's Bench, by check countersigned by the Clerk of the Crown.

The office-fees payable for inspection, office-copies, enrolment and other proceedings under the Act, and these rules, shall be the same as those payable, if any, for like proceedings according to the present practice of the Court of Queen's Bench.

LXII.

An agent employed for the Petitioner or Respondent shall forthwith leave written notice at the office of the Clerk of the Crown of his appointment to act as such agent, and service of notices and proceedings upon such agent shall be sufficient for all purpose.

LXIII.

No proceeding under the "Controverted Elections Act of 1871" *shall be defeated by any formal objection.*

LXIV.

Any rule made or to be made in pursuance of the Act, if made in Term time, shall be published by being read by the Clerk of the Crown in the Court of Queen's Bench; and, if made out of Term, by a copy thereof being put up in the office of the Clerk of the Crown.

Dated the day of March, A.D., 1871.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—WILLIAM HENRY LOCKHART GORDON, WILLIAM BOGGS, GEORGE LANGUISH TIZARD, GEORGE MILLER COX, JOHN GIBBS RIDOUT, WILLIAM WORTS EVATT, JOHN FARQUHAR BAIN, JOHN ROBISON CARTWRIGHT, JAMES JOSEPH FOY, SAMUEL ROBINSON CLARKE.

EASTER TERM, 34 VICTORIA, 1871.

(May 15, to June 3.)

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ JOHN WELLINGTON GWYNNE, J.

“ THOMAS GALT, J.

ROYAL CANADIAN BANK V. SHAW ET AL.

*Royal Canadian Bank—Charge of 8 per cent. interest on note discounted—
6 per cent. only recoverable from maturity—27 & 28 Vic., ch. 85, sec. 21—
Construction.*

Held, that the plaintiffs, a banking institution, having stipulated for and retained, in discounting a note, interest at a larger rate than 7 per cent., were not entitled to avail themselves of the provisions of their Act of Incorporation (27 & 28 Vic., ch. 85, sec. 21), allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than 7 per cent., which was *held* to be the meaning of the Act, and that, therefore, the note bearing no rate of interest on its face, they were not entitled to more than 6 per cent. from its maturity.

THIS was an action on a promissory note, dated at Peterborough, October 18, 1869, made by the defendant Shaw for the sum of \$34,000, payable to the order of the defendant Best, three months after date, at the Royal Canadian Bank, Toronto. The note was given for a debt due by Shaw to the bank, and discounted at the bank for him at 8 per cent., and the proceeds carried to his credit.

A verdict was taken in favor of the plaintiffs for \$204.80, which was calculated upon the assumption that the plaintiffs were entitled to charge 8 per cent., and leave was reserved to reduce that verdict to \$97.42 if the Court should be of opinion that the plaintiffs were entitled to 7 per cent. and to that amount only; whereas if the Court

should be of opinion that the plaintiffs were only entitled to 6 per cent., then a verdict was to be entered for the defendants.

In Hilary Term last, *Bethune* accordingly obtained a rule to set aside the verdict and enter a verdict for defendants; or to reduce the verdict for plaintiffs to \$97.42, pursuant to the leave reserved.

Harrison, Q. C., shewed cause this term, the contention on behalf of the bank being that they were, under their charter, 27 & 28 Vic., ch. 85, sec. 21, entitled to interest at the rate of 8 per cent. until the note was fully paid, namely, at the same rate as the note was discounted at. He referred to *Howland v. Jennings*, 11 C. P. 272; *Montgomery v. Boucher*, 14 C. P. 47; *Younge v. Fluke*, 15 C. P. 360.

Kerr, contra, cited *Commercial Bank v. Cotton*, 17 C. P. 214, 447.

The Statutes referred to are mentioned in the judgment.

GWYNNE, J., delivered the judgment of the Court.

The whole question arising in this case is, how much interest are the plaintiffs entitled to recover upon the promissory note declared on in this cause? The note did not, on its face, bear any rate of interest, so that the question is, in the absence of any contract between the parties for any specific rate of interest after maturity, what is the rate of interest which, by law, the plaintiffs were entitled to charge after maturity, having regard to the fact that the note was discounted at a rate of 8 per centum?

By 22 Vic., ch. 58, Consolidated Statutes of Canada, sec. 4, it was enacted that "no bank may stipulate for, take, reserve, or exact a higher rate of discount or interest than 7 per centum per annum, and that any rate of interest not exceeding 7 per centum per annum may be received and taken in advance by any such bank;" and by the 8th section, "six per centum per annum shall continue to be

the rate of interest in all cases where, by the agreement of the parties or by law, interest is payable, and no rate has been fixed by the parties or by the law." The *Commercial Bank v. Cotton et al.* (17 C. P. 214, and in Appeal, 447), decided that the effect of the 9th section of that Act was, that as to any bank violating the provisions of the Act, as a punishment for that violation, the note or other security taken is declared void, and that the corporation should be liable to the further penalty of three times the value of the moneys lent or bargained for.

The above Act was the Act in force regulating the rate of discount or interest which might be contracted for and taken by banks when the Act incorporating the plaintiffs was passed. The plaintiffs' charter, which has been referred to 27 & 28 Vic., ch. 85, sec. 21, enacts that the bank may allow and pay interest upon money deposited in the bank, and in discounting promissory notes, bills, or other negotiable securities or paper, may receive or retain the discount thereon at the time of discounting or negotiating the same; and the rate of discount then charged shall continue until said note or negotiable paper so discounted be paid or satisfied, or any judgment thereon. Now, upon the passing of this Act, the banking institution thereby incorporated became and was subject to the provisions of the General Act 22 Vic., ch. 58, and, of consequence, at no time between the passing of the Act incorporating the bank and the next Act which was passed affecting the power of banks in respect to rates of interest or discount, namely, 29 & 30 Vic., ch. 10, could the bank stipulate for, take, reserve, or exact a higher rate of interest or discount than 7 per centum per annum, and construing 27 & 28 Vic., ch. 85, sec. 21, with 22 Vic., ch. 58, sec. 4, the effect of the combined Acts appears to have been that, within the rate of discount authorized by law, the bank should be entitled to recover, by way of interest, after maturity, the same rate of discount as had been charged upon the note being discounted; the object being, as it seems, to remove all doubt as to what interest might be recoverable after

maturity, in the absence of a special contract for interest on the face of the note. The 29 & 30 Vic., ch. 10, sec. 5, relieved banks from all liability for forfeiture under the 9th section of 22 Vic., ch. 58, for a bank taking "more interest than the 7 per centum authorized by law; but the amount of the interest which such bank can receive shall remain as limited by the said chapter."

Now the effect of this Act was not to extend to the Royal Canadian Bank the exclusive privilege of stipulating for, and, in default of payment, of recovering, by process of law, any greater rate of interest than 7 per cent., but expressly to provide that, although forfeiture for violation of the Act was removed, the *authority* of the Act as to taking interest by banks should remain limited as before, and, of consequence, the construction to be put upon the 21st section of 27 & 28 Vic., ch. 85, since the passing of 29 & 30 Vic., must be the same as before, namely, that it relates merely to rates of discount taken within the amount *sanctioned* by law. As to any greater interest, if taken, *no forfeiture* is worked; but it has not the *sanction* of the law; it is taken *dehors* the law, and cannot be recovered by process of law.

The conclusion from this reasoning, as it appears to me, is that in this case the plaintiffs can only recover 6 per cent. since the maturity of the note; for, as the plaintiffs did not discount the note within the limit of 7 per cent. sanctioned and allowed by law, the provisions of 27 & 28 Vic. ch. 85, sec. 21, do not apply; consequently, there being no rate of interest agreed upon between the parties, the 8th section of 22 Vic., ch. 58, applies, authorizing only 6 per cent.

In pursuance, therefore, of the leave reserved, the verdict must be entered for the defendants.

Judgment accordingly.

IN RE CUNNINGHAM V. THE CORPORATION OF THE VILLAGE OF ALMONTE.

By-law of township prohibiting sale of liquors—Repeal of by village, after separation from township, without assent of electors—32 Vic. ch. 32, sec. 10 (Ont.)

Held, that the municipal council of a village, incorporated in and separated from a township, in which before and at the time of said incorporation a by-law existed prohibiting the sale of intoxicating liquors in shops and places other than houses of public entertainment within said township, could not, by a by-law not submitted for the approval of the electors of the village corporation, repeal the prohibiting by-law so far as it affected the village municipality, but that the by-law must be passed upon by the electors under 32 Vic. ch. 32, sec. 10 (Ont.)

Osler obtained a rule *nisi* calling upon the municipal council of the village of Almonte to shew cause why by-law No. 9 of that municipality, purporting to repeal, so far as the same affected the village municipality, a certain by-law of the township of Ramsay, within which said village was situated, prohibiting the sale of intoxicating liquors in shops and places other than houses of public entertainment within said township, and which by-law had been passed before the separation of the village from the township, should not be quashed, on the ground that the same had not been submitted for the approval of the municipal electors of the village corporation.

Harrison, Q.C., shewed cause, citing *McAvoy v. Sarnia*, 12 U. C. 98.

Osler, contra, cited *Hill v. Municipality of Walsingham*, 9 U. C. 310; *Grant* on Corporations, 90, 91; *Rex v. Ashwell*, 12 Ea. 22; *Angell* and *Ames* on Corp., 327.

The statutes are referred to in the judgment of the Court.

GWYNNE, J., delivered the judgment of the Court.

The question raised in this case is, whether or not the municipal council of the village of Almonte, which is a village incorporated in and on 1st January, 1871, separated from, the township of Ramsay (in which township before and at the time of the said village becoming incorporated

there was existing a by-law of the said township prohibiting totally the sale of intoxicating liquors in shops and places other than houses of public entertainment within the township of Ramsay,) can by a by-law, not submitted for the approval of the municipal electors of the village corporation, repeal the prohibitory by-law, so far as the same affects the village municipality. The statute under which the by-law in the township of Ramsay was passed was 29 & 30 Vic., ch. 51, sec. 249, sub-sec. 9, which enacted that the council of every township, town, and incorporated village, and the commissioners of police in cities, may respectively pass by-laws "for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any inn or other house of public entertainment, and for prohibiting totally the sale thereof in shops and places other than houses of public entertainment: provided the by-law before the final passing thereof has been duly approved by the electors of the municipality in the manner provided by this Act." Then the 250th section provides for the amount of licenses, and enacts that, "No by-law by which a greater sum than one hundred dollars per annum is intended to be exacted for any shop or tavern license, or for leave to exercise any other calling, or to do any other thing for which a license may be required, shall have force or effect unless the by-law, before the final passing thereof, has been duly approved by the electors of the municipality in the manner provided by the Act, and the by-law shall not be varied or repealed unless the by-law for that purpose has been duly approved of in like manner by the electors of the municipality."

The Ontario Statute 32 Vic., ch. 32, was passed for the purpose of *amending* and consolidating the several enactments relating to town and shop licenses.

The 6th section of that Act, sub-section 7, enacts precisely the provisions of 29 & 30 Vic., ch. 51, sec. 249, sub-sec. 9. The 10th section of this Act is substituted for the 250th section of 29 & 30 Vic., and makes a material alteration in the terms of expression from those used in section 250.

It enacts, after providing for the amounts which may be charged for licenses, as follows: "but no by-law by which a greater sum than \$130 per annum is intended to be exacted for any tavern or shop license, or for leave to exercise any other calling, or to do any other thing for which a license may be requisite, shall have any force or effect unless the by-law, before the final passing thereof, shall have been duly approved by the electors in the manner provided by the Act 29 & 30 Vic. ch. 51; *and any by-law so passed* shall not be varied or repealed unless the varying or repealing by-law shall have been in like manner submitted to, and approved by the electors of the said municipality."

Now the contention on the part of the municipality is, that this section makes no alteration in fact from the 28th section of 29 & 30 Vic., but the same construction is to be put upon both, that is to say, that they apply respectively only to the particular by-law in the sections mentioned for imposing a greater amount than \$100 in one case, and \$130 in the other, as a license fee; but we think that we cannot put the same construction upon language so different. In the 250th section of 29 & 30 Vic., it is *the* by-law, that is, the by-law in that section authorized, which it is provided shall not be varied or repealed, &c.; but in 32 Vic., ch. 32, sec. 10, this language is wholly changed, and the language substituted is, "and *any* by-law *so passed* shall not be varied or repealed," &c. This language is sufficient to extend to every by-law which, to give it validity, must be submitted to, and approved by the electors. The language is to be regarded as that of an enacting clause, rather than as part of the proviso which was inserted to qualify the power as to the enacting of the first by-law. It seems to me that the language in 32 Vic., ch. 32, sec. 10, was intentionally substituted for that in 29 & 30 Vic., ch. 51, sec. 250, for the express purpose, and reasonably, too, of submitting the power of repeal in all cases to the same power that had in substance the power of enacting, and to introduce in effect in this respect the provisions of 27 & 28 Vic., ch. 18.

When, then, the village of Almonte became a corporation in 1871, the by-law No. 172 of Ramsay was, by the 21st sec. of 29 & 30 Vic., ch. 51, in force in Almonte, and it was to continue in force therein until repealed or altered by the council of the new corporation. The 21st section provided that no such by-laws should be repealed or altered unless they could have been, or can be, legally repealed or altered by the council which passed the same.

We think, also, that upon the proper construction to be put upon 32 Vic. ch. 32, sec. 10, Ontario Statutes, they must be altered or repealed in the same manner and by the same authority as the by-law proposed to be varied or repealed had to be passed in the first instance to give it validity.

Rule absolute.

WILSON v. THE CORPORATION OF THE TOWN OF ST.
CATHARINES.

By-law—Prohibition to huckster under 29 & 30 Vic. ch. 51, sec. 296, sub-secs. 11, 12, and 31 Vic. ch. 30, sec. 32 (Ont.)—Invalidity.

A by-law of a municipal corporation, purporting to be passed under 29 & 30 Vic. ch. 51, sec. 296, sub-secs. 11 and 12, and 31 Vic. ch. 30, sec. 32 (Ont.) prohibiting any huckster, butcher, or runner, from buying or contracting for any kind of fresh meat or provisions on the roads, streets, or any place within the town on any day before the hour of 9 o'clock, a.m., between 1st April and November, or before 10, a.m., during the remainder of the year, was held bad, and ordered to be quashed.

James Miller obtained a rule calling upon the defendants to shew cause why the 43rd section of by-law No. 117, intituled "A by-law relating to the market, and the duties connected therewith, should not be quashed with costs, upon the ground that the said corporation had no power to restrain the buying of, or contracting for the articles in the said 43rd section mentioned, in the manner therein stated."

The section complained of was as follows: "That no huckster, butcher, or runner shall buy or contract for any kind of fresh meat or provisions on the roads, streets, or any place within the town on any day before the hour of nine o'clock, a.m., between the first days of April and November, or ten o'clock, a.m., on any day during the remainder of the year."

Harrison, Q.C., shewed cause, and referred to *Cameron v. East Nissouri*, 13 C. P. 190; *Fennel v. Corporation of Guelph*, 24 U. C. 238; *McLean v. St. Catharines*, 27 U. C. 603; *Tomlin's Law Dic.* "Victuals."

Miller, contra.

GALT, J., delivered the judgment of the Court.

This by-law was intended to give effect to sub-secs. 11 and 12 of sec. 296 of the Municipal Act of 1866, as amended by 32 sec. of 31 Vic. ch. 30 (Ont.) These sub-sections, as amended, read as follows: The corporation may pass by-laws, sub-sec. 11, "for preventing the forestalling, regrating, or monopoly of market grains, meats, fish, hay, straw, fodder, wood, lumber, eggs, and all articles required for family use, and such as are usually sold in the market; sub-sec. 12, for preventing and regulating the purchase of such things by hucksters, runners, or butchers living within the municipality, or within one mile from the outer limits thereof."

The contention by Mr. *Miller*, in supporting his rule, was, that the by-law complained of was much wider in its application than was warranted by the statute, and would have the effect of fixing a personal disability on a man carrying on the trade of huckster, butcher, or runner, apart from his trade, so much so as to render him liable to the penalties of the by-law if he purchased any of the articles mentioned, although they were required for the use of his family, and not for the purpose of re-sale; for example, that a butcher could not purchase a dozen of eggs, or a huckster a quarter of lamb. We think the by-law is open to this objection. It is evident that the intention of the legislature was to prevent hucksters, butchers, or

runners from forestalling, regrating or monopolizing the articles mentioned, for the purposes of their respective trades, and was not intended to apply to those persons as individuals. There could be no reason why a butcher, for example, should not have the same right as a baker to purchase provisions for his family in any manner, or at any hour he pleased. We think, therefore, that this rule should be made absolute.

Rule absolute.

RIACH V. NIAGARA DISTRICT MUTUAL INSURANCE CO.

Mutual Insurance—Representation of cash value—Warranty—Question for Jury.

Held, in an action on a mutual insurance fire policy, that a representation of present cash value is not a warranty, but is so far material that on the trial the jury should say whether or not there was an overvaluation to the knowledge of the applicant, and, if so, the policy is void.

THIS was an action tried before Morrison, J., at the last Winter assizes at Toronto, on a policy of insurance.

The 4th plea was, that by the 16th by-law of defendants, endorsed upon the policy and forming part thereof, as by the policy provided, it was declared that any misrepresentation in the answers given to the several queries in the plaintiffs application should vitiate the policy, unless written notice within ten days thereafter, containing full particulars, should be given to the Secretary of the Company and the consent of the Company's Board of Directors obtained thereto, and endorsed on the policy in the manner therein provided for: *Averment*, that plaintiffs by their said application falsely represented the then present cash value to be \$5800, whereas it was much less, and plaintiffs did not at any time thereafter give defendants notice of such misrepresentation, nor did defendants assent thereto or have notice thereof.

The 5th plea was, that the policy was obtained by fraud.

The 6th plea was, that the plaintiffs by their application, upon the faith of which the policy was issued, and which proved a part thereof, represented the cash value of the property to be insured to be \$5800; that such representation was of a fact material to be known to the defendants, and material to the risk, whereby plaintiffs warranted said cash value of said property to be \$5800, but was only of or about the value of \$1700, by reason whereof defendants were not liable upon said policy.

It appeared that on the 23rd April, 1870, plaintiffs applied to defendants for a renewal of a policy held by him. That policy was on the basis of a cash premium, but the renewal policy was to be on the mutual system. Upon the back of the application the laws, by-laws, and conditions of insurance were printed, among which were the following: "By-law 10. Every person wishing to become a member of this company shall, previous to being insured, deposit an application, which said application shall be taken, held, and received to be, and form part of the policy of insurance granted thereon, and shall be held and read in connection therewith." "By-law No. 16. The following circumstances will vitiate a policy unless written notice within ten days thereafter, containing full particulars, shall be given to the Secretary of this Company, and the consent of the Board obtained thereto and entered on the policy, and signed by the President and Secretary, the Board reserving to themselves the power to approve or reject such." "Sec. 6. If any misrepresentation in the answers given to the several queries in the application, or any mistake or want of delineation in the diagram in application, &c."

The application was headed "Application for Renewal of Policy."

"NOTE.—In no case will more than two-thirds of the actual cash value of the property, exclusive of land, be insured."

Amount to be insured, &c.	Present estimated value in cash.
Dry Goods. \$1000	Estimated value.... \$3000
Groceries. 450	" 3000
China. 50	" 1000
Hardware 100	" 300
Provisions. 100	" 300
Boots, Shoes, and Leather. 200	" 800
Fancy Goods. 100	" 200
<hr/> \$2000	<hr/> \$8600

At the foot of the application it was stated, "This application to be and form part and parcel of the policy to be issued thereon."

The learned Judge left it to the jury to say what amount of goods covered by the policy was destroyed by fire, and also to say, under the 4th plea, the amount of goods in value at the time of the application for insurance, 23rd April, 1870, and also with a view to the 6th plea; and also to say, under the 5th plea, whether there was fraud in obtaining the policy. He stated that he did this for the purpose of ascertaining these facts, so if necessary he might reserve leave to defendants to enter a verdict for them, should they be of opinion the goods were under the value of \$5800.

After some time the jury came into court and said they found the amount of goods destroyed by fire to be \$1400, and they rendered a verdict for the plaintiffs for that amount, and they found the value of the goods at the time of insurance did not exceed \$3500; and they rendered a verdict for the plaintiff on the 5th plea.

Leave was reserved to defendants to move to enter a verdict for them, or a nonsuit, on the above finding.

In Hilary Term last *Harrison*, Q. C., obtained a rule to enter a nonsuit or a verdict for defendants, pursuant to leave reserved, on the grounds stated at the trial; or for a new trial on the law and evidence.

McMichael now shewed cause.

Harrison, Q. C., and *Moss*, contra, cited *Anderson v. Fitzgerald*, 4 H. L. Ca. 484; *Mason v. Agricultural Association of Canada*, 18 C. P. 22, per VanKoughnet, C., p. 27, per Mowat, V. C.; *Martin v. Home Insurance Co.*, 20 C. P. 447; *Scales v. Scanlan*, 6 Ir. L. R. 367.

GALT, J.—The policy sued upon was issued on the following application (which the learned Judge here set out as above, and then proceeded:)—The policy is declared to be on the following property, as described by their (the plaintiffs) application, to wit:—(here followed a description of the property insured as in the above application)—“reference being had to the application of said Riach Brothers, and to the by-laws of the Company and conditions of insurance as forming a part of this policy.” The by-laws and conditions are printed on the back of the policy, and are the same as those printed on the back of the application. It is impossible to afford more information to a person effecting an insurance than has been done by the defendants as to the terms and conditions on which the defendants agree to be responsible. This is a policy in a Mutual Insurance Company, and by effecting it the plaintiffs became members of the Company, and subject to the by-laws of the Company. In *Angell on Insurance*, sec. 146, it is laid down as follows: “The leading principle of Mutual Insurance Companies is, that every person whose property is insured becomes a member, and is consequently under obligation to observe its by-laws; and the rules and regulations, being referred to in the policy, are to be taken as a part of the contract of warranty in the same manner as if they had been introduced into the body of the policy.” By sec. 25 of ch. 52, C. S. U. C., “Every person insured by the Company, and the heirs of every such person continuing to be insured therein, shall be members thereof during the terms specified in their respective policies and no longer, and shall at all times be subject to the provisions of this Act.” Among those provisions is sec. 62, whereby the Directors

"may from time to time make and subscribe such by-laws, ordinances, rules, and regulations, as to them appear needful and proper respecting the funds and property of the Company, the duty of the officers, the effectual carrying out the objects contemplated by this Act, and all such other matters as appertain to the business of the Company, &c., &c." Acting under this authority, the Directors of this Company passed by-law No. 10, above referred to, long before the plaintiffs became members of the Company, and of the existence of which they had express notice both by the application and by the policy, as a copy of it is printed on both. By the provisions of this by-law "the application shall be held, taken, and received, to be and form part of the policy of insurance granted thereupon, and shall be held and read in connection therewith." This is the agreement also of the parties as appears from the application and the policy itself. This being the case, it appears to me that we must read the policy by adding to the words in the policy, descriptive of the goods insured, and of the amount of insurance, the words in the application, "Present estimated value cash, \$5800." The jury have found that the value "did not exceed \$3500."

It was urged before us by the counsel for the defendants that, as by the policy, the Act of Parliament, the by-law, and the application, the application was to be read as a part of the policy, that therefore the statement of the estimated value must be considered as a warranty, and consequently the plaintiffs cannot recover in this case, as it is proved that the value is much less than that estimated. I do not feel that I can accede to this contention, because, if so, the finding of a jury that the true value was less even by a small sum than the amount stated in the application, would be fatal to the plaintiffs. This would be, in my opinion, to convert what is stated to be an estimated value into a warranty of a positive value. But I do think that some effect should be given to the allegation, and that it must be made as a representation on the part of the plaintiffs, that the amount stated is really and truly a fair and rea-

sonable estimate of the value stated, and if from the verdict of a jury it is shewn that the estimated value is neither fair nor reasonable as regards the actual value, so much so that it could not have been formed on any estimate truly made, I am of opinion that the representation is broken, and that a plaintiff under such circumstances is not entitled to recover. I have been unable to find any case in which the point now in question has been decided; but in *Dickson v. The Equitable* (18 U. C. 246), which was a case of over-valuation, Sir John Robinson, C. J., in giving judgment says, "Whether upon the facts proved here there was so plain and so material misrepresentation made by the plaintiff as ought to avoid the policy, though not upon a point respecting which there is any warranty or condition in the policy, is a question that must be left to the jury, because they alone can draw inferences of fraud." That case differs from the present in this that there was no reference to the application, so as to make it a part of the policy. This I infer from the judgment. Had such been the case, I think that from the above observations the learned Chief Justice would have held the policy to be void. The Court in that case granted a new trial, with costs to abide the event. There is no necessity for quoting authority to shew that warranties must be strictly complied with, or that conditions expressly referred to in the policy are to be read as a part of the policy, as the text books and authorities are full of cases to that effect; but the difficulty that I have felt in this case arises from the use of the word "estimated."

I am of opinion that there should be a new trial in this case, and that the proper direction to be given to the jury, on the next trial, would be, that they should ascertain whether at the time of making the application the plaintiffs knew that the value was over-estimated, and if so, to find for the defendants. I am of opinion that considering the words of the application and the reference to it in the policy, the fair construction to be put upon them is, that the applicant undertakes that he will, if necessary,

prove to the satisfaction of a jury that the statement of the estimated cash value was a fair and reasonable estimate. As it does not appear that the learned judge so left the case to the jury, there should be a new trial with costs to abide the event.

GWYNNE, J.—The contention of the defendants was that the values in the application which it is declared shall form part of the policy set opposite the words, “estimated value,” in a column headed “present estimated value in cash,” constitute a warranty that the several articles insured are of the respective values so set opposite to them. Mr. Moss’s mode of putting the case was that the above words constitute a warranty that a jury will find the value to be *at least* to the amount estimated by the insured. I cannot concur in this view. I cannot think that statements as to price or value are to be regarded in the same way as statements as to title or quality or as to the existence of a particular fact matter or thing; as for example, that the statement of a person proposing to insure his house as to his idea or estimate of its value, although a jury may not concur in that estimate or idea, is to be placed in the same category, and to be regarded in the same light as a statement that it is roofed with galvanized iron laid over a bed of mortar, when in fact the roof consists of gravel laid in a bed of tar. I cannot think that an estimate, if morally and sincerely made, in a belief of its truth, is to avoid a policy, because a jury cannot be got to concur with the owner in the estimate he puts upon his property. But undoubtedly the words must have some meaning, and reasonable effect must be given to that meaning, as we may well understand it is material for an Insurance Company to know what is a fair estimate of the value of the goods they are asked to insure, in order that they may form their judgment as to the amount of risk they would be willing to take upon them. The application plainly indicates to the person proposing to insure that the Company, of which he is about to become a member, will take no risk exceeding two-thirds of

the actual cash value ; but the Company may not wish to take even that amount of risk. It is apparent therefore that it is material that the Company should be informed what is a fair estimate of the present cash value of the goods proposed to be insured. I concur therefore in thinking that in this case there should be a new trial for the purpose of enabling a jury to express their opinion whether or not the estimated value stated by the plaintiff was a fair estimate, honestly made with a reasonable belief in its truth entertained by the plaintiff, for that appears to me to be the question really involved in so far as the above words in the application are concerned.

HAGARTY, C. J.—I agree in the result arrived at by my brother Galt.

I regard the effect of plaintiff's contract with defendants to be, that he states the property to be insured is at that time of the estimated cash value of so much ; that he warrants (as it were) that, if necessary, he can satisfy a jury that, at least in his honest judgment, they were fairly estimated at that value.

I do not use the term "warranty" in its legal sense, as I do not regard the words here used as implying a warranty, so called.

Had the plaintiff signed a declaration, which was to be taken as the basis of the contract that the goods were of the value of , it would seem that he would so warrant them to be of that actual value, and his belief that they were so would not suffice if they were not so in fact.

The law seems well explained in the judgment of Blackburn, J., in *Fowkes v. Manchester and London Assurance Company*, 3 Best & Sm. 930: "Here we find, in the declaration attached to the policy, these words, 'I do hereby declare that the above written particulars are correct and true throughout': that is a declaration that those particulars are true; and 'I do hereby agree that this proposal and declaration shall be the basis of the contract between me and the Manchester and London Assurance Company:' that makes the declaration a warranty."

I think the case before us falls short of this. The by-law provides among the circumstances that will vitiate the policy "Any misrepresentation in the answers given to the several queries, &c."

Then we find the assured answers a statement that the "present estimated value" is so much, and at foot thereof is a printed application or letter, asking for insurance "subject to, and in compliance with the several conditions and laws and by-laws set forth in this application, and I declare that the ashes shall be kept, &c., &c., and that I have fully set forth and described in the other page hereof all alterations and changes that have been made either in the premises or title since last insured: this application to be, and form part and parcel of the policy to be issued herein."

I think that all we can hold plaintiff to here is, that the "present estimated value" is his honest estimate at the time, not that it is warranted to be absolutely true.

Sir A. Cockburn says in the case last cited, "In construing an instrument prepared by the Company and submitted by them to the party effecting the insurance for his signature, it ought to be read most strongly *contra proferentes*."

I think we have arrived at the true meaning of this policy.

Jurors are apt to be extremely charitable in their construction of plaintiff's motives, whenever the defendants are an Insurance Company. We cannot help desiring that another jury should be asked the question whether, assuming our view of the legal bearing of the assurance, it is possible for a man honestly to state that his goods were fairly estimated at \$5,000, when in truth they were only worth \$3,500.

Rule absolute for new trial, costs to abide event.

SNARR V. BEARD.

Lease—Covenant to repair—Contemporaneous memorandum specifying same.

Defendant demised to plaintiff a yard and wharf, covenanting, generally, to put the wharf into good and sufficient repair on or before a given day. The condition of the wharf was discussed between the parties, and a memorandum was drawn up by defendant and signed by both: "Work to be completed to put wharf into good repair: two stringers and one stringer to be put into place; all that part of wharf not planked to be planked with new plank, and all the broken plank or holes to be repaired with sound plank." Plaintiff signed this memorandum before examining the wharf, and on defendant's representation that it was all right. These repairs were executed, but about a month afterwards the wharf fell in, caused, apparently, by the defective state of the caps on which the stringers rested. There was no clear evidence of an agreement as to any specified amount of repairs being taken as full performance of the covenant in the lease:

Held, that the memorandum did not control or modify the covenant, and that plaintiff was entitled to recover for the damage sustained by the wharf not having been put into good repair.

DECLARATION on a lease made by defendant to plaintiff for five years, from 1st July, 1869, of a coal and wood yard and wharf, for receiving and storing coal and wood, and a covenant by defendant to put the wharf into good and sufficient repair on or before the 10th day of July afore-said: Breach, that the wharf was not put in repair, &c.

Pleas, 1, that defendant did put the wharf into good repair; 2, that after the making of the deed, and before 10th July, it was mutually agreed that the work required to be done to the wharf, to put the same in good and sufficient repair, was to put in two new stringers, &c.: *Averment*, that after the agreement he did said work so agreed upon, and thereby put the wharf into good and sufficient repair.

At the trial, without a jury, at Toronto, before Richards, C. J., a great deal of evidence was given, from which it appeared that when plaintiff took the wharf it was out of repair, and its state was discussed between the parties. A memorandum was drawn up by defendant:—

"Work to be completed to put wharf into good repair.

"Two stringers and one stringer to be put into place; all that part of wharf not planked to be planked with

new plank, and all the broken plank or holes to be repaired with sound plank.

“ JOHN SNARR,

“ G. T. BEARD.

“ *Witness*: W. H. STEELE.

“ Toronto, 3rd July, 1869.”

Defendant swore that he and plaintiff discussed the question as to what “good repair” meant, and that plaintiff wanted him to do more repairs than he was willing to do (this was after the lease was drawn); and that plaintiff thought it meant more than defendant thought; that he, plaintiff, signed the lease and the memorandum, and gave them to the witness, Steele, telling him to give plaintiff the lease, on his signing it and the memorandum, otherwise to return the lease to defendant, and next day he received both signed; also, that he had previously told plaintiff if he did not choose to sign it as the memorandum made it, he need not take it at all.

Plaintiff swore that he signed the memorandum before he had examined the superstructure of the wharf, and on defendant’s representation that it was all right, and he thought at the time that the repairs mentioned in the memorandum would be sufficient.

No evidence was given on either side as to what passed between them at the signing of the lease and the memorandum. A large portion of plaintiff’s evidence went to shew that the work in the memorandum was badly done. These repairs were not completed till 20th July, ten days after the day fixed by the covenant. In August part of the wharf fell in, with a large quantity of cordwood on it, and plaintiff then repaired it at his own expense. This seemed clearly to have been caused by the defective state of the caps on which the stringers were placed, and not from the manner in which the actual repairs were done.

For defendant it was contended that the memorandum controlled the covenant; for the plaintiff, that it was no part of the covenant. The learned Chief Justice thought

the plaintiff should recover (in the view that the covenant was not modified by the memorandum),

For the expense of repairing the wharf.....	\$236 33
And injury for not having use of wharf	50 00
	<hr/>
	\$286 33

He considered the damage did not arise in any way from the breach of covenant, as contended for by the plaintiff, but from the rotten state of the cross pieces below, and he reserved leave to defendant to move to reduce the verdict to nominal damages, if the Court was satisfied that the written memorandum modified the covenant.

Defendant moved to amend the plea by pleading it as an equitable defence.

In Michaelmas Term last *McMichael* obtained a rule to set aside the verdict on the law and evidence, and that the covenant sued on had been fulfilled according to the specifications agreed upon between the parties; or to reduce the verdict to nominal damages, on the leave reserved.

Thomas Moss now shewed cause, citing *Harden v. Clifton*, 1 Q. B. 522; *Spence v. Healy*, 8 Ex. 668.

McMichael, contra, cited *McGinness v. Kennedy*, 29 U. C. R. 93; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Pharoah v. Lash*, 2 F. & F. 721; *Gemmell v. Macalister*, 9 Jur. N. S. 285; *Harris v. Ricketts*, 4 H. & N. 1; *Lavery v. Turley*, 6 H. & N. 239; *Malpas v. London and South Western R. W. Co.*, L. R. 1 C. P. 336.

HAGARTY, C. J., delivered the judgment of the Court.

We do not see how we can say, as a matter of law, that the memorandum modified the covenant.

If the evidence shewed clearly that the parties agreed on a certain specified amount of repairs as a full performance of a general covenant to put the wharf in good and sufficient repair by a given day, we think the defendant's position would be sound; or if anything had been proved to bring the case within the principle of *McGinness v.*

Kennedy (29 U. C. R. 93), as, for instance, that defendant proposed inserting certain words in the lease to modify the covenant, and plaintiff prevented that being done by agreeing or representing that the memorandum would have that effect. But we hardly dare draw such a conclusion from the evidence. We think plaintiff believed, at the time he took the lease, that, if defendant would do the work mentioned in the memorandum, such work would put the wharf in a fit state for his purpose. From a defect, latent from him, in the caps resting on the piles, the wharf gave way in August. He appears to have practised no deception on plaintiff, nor anything to induce him to enter into a general covenant, or induce him to consider that the memorandum was to be a legal modification of it.

We may easily understand the leasing of a house with the landlord's covenant to put it into habitable repair by a given day. He may, in good faith, ask the tenant what was required to be done, and the latter in equal good faith may specify certain patent defects to be rectified, and a memorandum like this may be executed. Without the knowledge of either some of the floors are in a rotten state. The landlord duly executes the repairs in the memorandum, and after the day named a floor gives way, rendering the house partly uninhabitable. We hardly see how the tenant is to lose all remedy on the general covenant to repair by the existence of any such memorandum. He took the house for a term, with a guarantee that it should be repaired so as to be sufficient, *i.e.*, habitable. He agreed to pay rent on the faith of such guarantee.

A certain loss is sustained by the latent rottenness of the caps. Who is to bear that loss? Is it the tenant, because he signed a memorandum "specifying certain work to be completed to put the wharf in good repair," honestly believing that such would suffice, or the landlord, who covenanted absolutely to put this wharf in sufficient repair?

The second plea merely amounts to the assertion that the parties agreed as to what work was required to put the wharf in good repair, that defendant made such repairs,

“and thereby put the wharf into good and sufficient repair.”

This would not be a good legal bar as pleaded ; and if we acceded to the defendant's wish at the trial to make it a plea on equitable grounds, we fail to see its validity as a defence.

No such statement in a bill filed by defendant would be sufficient, we think, to restrain this action on the covenant. There must be a statement of facts shewing an equity to have the covenant modified to a contract, not to repair generally, but to do certain specified work as repairs.

Could defendant have filed a bill to have the lease reformed by modifying the covenant, or rather to limit it to the performance of the repairs specified in the memorandum ? We do not think the evidence adduced would entitle him to a decree.

The learned Chief Justice drew no inference apparently unfavorable to plaintiff's right to recover, and on the evidence before us we cannot see our way to refusing compensation to plaintiff for the loss he has sustained. We see no reason for shifting the burden of this loss from the landlord to the tenant on a demise like that on this case.

We think defendant's rule should be discharged.

Rule discharged.

MCQUARRIE V. FARGO.

Express Co.—Contract to carry and present note for payment—Delivery to Notary—Failure to notify indorser of non-payment—Company not liable.

Plaintiff sued defendant, an agent of an express company, on an alleged undertaking by defendant to take and carry a copy of a lost note and present it for payment, and in case of non-payment to notify the indorsers. and to take all necessary steps to notify them thereof, averring the delivery of the note to defendant, with *breach*, that defendant did not present or notify, nor take any steps to notify the indorsers of non-payment, in consequence of which the endorsers availed themselves of their discharge from liability, and refused to pay the note. The evidence shewed no demand by plaintiff upon the indorsers for payment, nor refusal by them to pay. It moreover appeared that defendant did convey the copy of note to the place agreed upon and there placed it in the hands of a notary for presentment, and protest in case of non-payment, and that though the notary did present, he neglected to notify the indorsers in due time of the non-payment. Defendant pleaded that he did not promise as alleged, and that he did duly present :

Held, that defendant was entitled to a verdict ; for that he had fulfilled his contract by carrying the note to the place agreed upon and placing it in the hands of a notary for presentment and protest.

The plaintiff declared that, being the holder of, and entitled to recover payment of a promissory note for \$750, dated 7th December, 1864, made by one John Harris, and endorsed by one L. McQuarrie, and also indorsed by one William Harris to plaintiff, and payable eighteen months after date at the Bank of Montreal in Toronto, the same became accidentally lost before maturity, and that before maturity, to wit, on the 8th day of June, 1866, in consideration that plaintiff would deliver to defendant a copy of the note, to be by the defendant taken and carried from the village of Caledonia to the City of Toronto, and to be presented at the Bank of Montreal at Toronto at maturity, and in case of non-payment due and proper notice of the non-payment to the indorser to be given forthwith to defendant, defendant promised plaintiff to take and carry said copy of said note and to present the same at maturity at the said Bank of Montreal at Toronto for payment, and to demand payment thereof, and in case of non-payment of said note, upon such pre-

sentment, to give forthwith due and proper notice of such presentment and non-payment to McQuarrie and William Harris, the indorsers, and to take all steps necessary to notify them of such presentment and non-payment; and plaintiff delivered said note to defendant, who received same for the purposes and upon the terms aforesaid: *Breach*, that defendant did not present the note at said bank, nor did he give due and proper notice to said indorsers of the non-payment of said note, nor did he take any steps to notify said indorsers, whereby they were discharged from their liability on said note, and refused to pay same, and plaintiff lost the amount of said note.

The declaration contained a second count precisely similar to the above, except that the contract was alleged to be to present at Brampton, and the breach was non-presentment there, but in other respects it corresponded with that in the first count.

Defendant pleaded that he did not promise as alleged, and that he did duly present.

At the trial, before Galt, J., it appeared that L. McQuarrie, the payee of the note, and who was a brother of plaintiff, transferred the note, with William Harris's indorsement on it, to plaintiff, and that shortly thereafter L. McQuarrie became insolvent. Plaintiff, having been examined on his own behalf, stated that his brother gave him the note sometime in January, 1865. On 26th April, 1865, John Harris, the maker of the note, having got into difficulties, a meeting of his creditors was held in the City of Toronto. Mr. Blain, a barrister and solicitor of Toronto, upon the instructions of L. McQuarrie, but upon behalf of D. McQuarrie, who was represented to him to be the holder of the note in question, attended that meeting. The meeting was also attended by the indorser William Harris, who was a large creditor of John Harris, who was his son, and by other creditors of John Harris. At this meeting an agreement was signed, which was in the terms following, prepared by and in the handwriting of Mr. Blain: "It is hereby agreed that in consideration of John Harris making an assignment

under the above Act, and his father William Harris withdrawing or abandoning all his claims and demands on the estate of his son John Harris, that we the undersigned firms shall erase the name of William Harris, as indorser on the notes made by the said John Harris in favor of L. McQuarrie, or will release and indemnify, as far as their own acts are concerned, the said William Harris, and will execute all proper bonds for that purpose; and it is further understood and agreed that we hold the notes above referred to, dated 26th April, 1865." This agreement was signed by Buchanan, Harris & Co., John Charlesworth & Co., D. McQuarrie, per D. Blain, and Henderson & Bostwick. This agreement was produced by Mr. Blain at the trial, and plaintiff afterwards, having recalled himself, said that he had never heard of it until the day before the trial, and that he never authorized any one to sign it on his behalf. It appeared, however, that upon the faith of the above agreement John Harris did make an assignment in insolvency, and that his father made no claim whatever therein, and that his name was erased from the notes held by the other persons who signed the agreement. The note in question was proved against the estate of John Harris in the insolvency, which estate had been wound up, and the note upon being proved was filed with the assignee. The plaintiff received his dividends from that estate. There was no evidence to shew that the note at the time of its maturity was lost, nor was any application made to the assignee for it, nor any search made for it in order to have it presented. There was a contradiction in the evidence as to the terms of the contract upon which the copy of the note was delivered to the defendant, who, it was admitted, represented the express company, which company did, however, take charge of the conveyance of promissory notes (as well as other things) from place to place, in order to have them presented when payable; but what the defendants' agents appeared to have done with the copy was that they sent it to Brampton to be there presented to the maker, but that, he not then residing there, they sent it in to Toronto where

it was placed in the hands of a notary for presentment. It was duly presented by the notary in proper time, namely, on the 11th June, 1866, but by the notarial protest, which accompanied the note, it appeared that the notices to the indorsers were not mailed until the 14th June, 1866. No evidence was offered of any demand for payment made upon the indorsers, or either of them, nor of any refusal to pay by them, or either of them, nor of either of them having set up in any manner a claim to discharge from liability for want of due notice.

No claim was made in this action in respect of L. McQuarrie not having been duly notified.

The learned Judge, before whom the case was tried without a jury, was of opinion that the plaintiff failed to establish the contract as laid, and he rendered a verdict for the defendant.

In Easter Term *Bell* (of Hamilton) obtained a rule to set aside this verdict and enter a verdict for plaintiff, or for a new trial, upon the evidence and weight of evidence, and upon the law, in this, that the learned judge ruled that the plaintiff could not recover without proving a demand of payment of the note on the indorser, and that at all events the plaintiff was entitled to a verdict for nominal damages.

Upon shewing cause to the rule *McMichael*, for the defendant, among other things, contended that under the circumstances proved in evidence the presentment of the copy, while the note was not in reality lost, but was filed with the assignee in insolvency, and its being made without a bond of indemnity being tendered, was not sufficient to bind the indorser.

Bell supported the rule.

No authorities were cited.

GWYNNE, J., delivered the judgment of the Court.

In a note to the American edition of *Byles on Bills*, 299, it is said, upon the authority of *Smith v. Rockwell* (2 Hill

482), that in order to charge the indorser of a lost promissory note, the owner must tender an indemnity to him and the maker at the time of demand and notice. That case is a decision of the Supreme Court of the State of New York, and it purports to proceed upon the authority of *Hansard v. Robinson* (7 B. & C. 90) and *Chitty on Bills*, 423. The Chief Justice there says, that as the maker is not bound to make payment without the production of the note, or indemnity in case of loss, for that very reason payment ought not to be required of the latter till the proper steps are taken to secure his immediate recourse against his principal; besides, the indorser's own liability upon the paper demands indemnity to himself, which should be given without delay, so that he may be in a situation to pay the demand at any time after notice, and to look to the maker. The case also decides that a provision in the revised statutes, enabling a party to sue on a lost bill, similar to our own law in that behalf, applies only to the remedy, but in no way affects the rights or liabilities of the parties arising out of the proceedings to charge the drawer or indorser. However, whether or not a presentment, made such as this was, of a copy of a note, not shewn to have been lost, but reasonably shewn to have been deposited by the plaintiff with the assignee in insolvency of the maker, and not applied for there for the purpose of presentment, without any indemnity having been ever yet tendered to the maker or the indorser, although notice of protest made upon presentment of the copy may have been duly given to the indorser, is sufficient according to our law to enable the loser to recover against the indorser, we are not now called upon to decide, because I think it very clear that upon this record and the evidence given at the trial, the plaintiff, if entitled to recover at all, could not recover more than nominal damages: the gist of the plaintiff's claim, as set out upon the record, in so far as his right to damages is concerned, consists in the averment that the indorsers availed themselves of the discharge from liability

which the alleged neglect of the defendant created, and for that reason refused to pay the note to the plaintiff.

Now the evidence is not only defective as shewing no such refusal, but no demand ever made upon them. If William Harris had been sued by the plaintiff, it is possible that he might have abstained from setting up any want of notice as a defence, and might have rested his defence upon the agreement of the 26th April, 1865, fulfilled by William Harris upon his part. In that action he might have been able to induce a jury to believe that the plaintiff was a party to, and bound by that agreement, or he might perhaps have contended that his contract was to pay, in the event of the maker not paying upon the note itself being duly presented to him, and that no such presentment had been made, and if he had failed in establishing a good defence upon those grounds in that action, the plaintiff would have recovered a judgment against him, and so could not recover any damages, in the action against the defendant, beyond at least nominal damages, although the latter had broken the contract with the plaintiff. But even though we should have arrived at a different conclusion from that arrived at by the learned judge who tried the case, I do not think we should set aside the verdict for the mere purpose of entering a verdict for the plaintiff, with nominal damages, in an action on promises. I think, however, that the verdict rendered for the defendant is correct, and should not be set aside. I see nothing in the evidence to support the material allegation contained in the declaration that defendant, whose business is that of a carrier, although of valuable chattels and securities, undertook also to perform the duties of a notary, and to protest the note for non-payment, and give the ordinary notice of dishonour. When, as it appeared in evidence, the defendant conveyed the note to Toronto, where it was payable, and there placed it in the hands of a notary for presentment, protest and notice, it appears to me that the defendant discharged the undertaking which he assumed, which, as I deduce from the evidence, was no

more than to convey and to place the paper entrusted to him in the hands of a notary, whose professional duty it is to present, protest, and notify. The learned judge who tried the case, and had the opportunity of hearing the witnesses, and of observing their manner of giving their evidence, came to the conclusion that, as a matter of fact, the defendant was not retained to protest the note or to give notice to the indorsers; but assuming, as was contended in argument, that an undertaking to protest and give notice is involved in an undertaking to present, I, in the discharge of the duty devolving upon me under the statute, to draw all inferences as a juror, and to find facts, can come to no other conclusion from the evidence than that the extent of defendant's undertaking was to convey in due time and to place the document entrusted to him in the hands of a professional man to be dealt with, and that he fulfilled his undertaking by handing the document to a notary for presentment. Upon the issue therefore, that the defendant did not promise, as alleged, the verdict is, in my judgment, properly found for the defendant, and should not be disturbed.

Rule discharged.

LINFOOT V. DUNCOMBE.

Dower—Judgment of seisin under 32 Vic. ch. 7, sec. 16 (Ont.)—Damages for detention—Statute of Merton.

A judgment for seisin of dower, under sec. 16 of 32 Vic. ch. 7, (Ont.), is absolutely final and conclusive, and there is no provision of law in such a case entitling a demandant to any damages of any nature or description, nor any mode of proceeding provided by law for ascertaining any such damages.

The Statute of Merton remarked upon and distinguished.

DOWER under 32 Vic. ch. 7, (Ont.), by demandant, as widow of John Simpson, deceased, the writ being indorsed with the notice under section 6 of that Act, with a claim for damages (\$350) for detention, under section 7.

Defendant appeared under section 16, and also filed an acknowledgment and consent thereunder, but denied his liability for damages for detention.

Demandant thereupon signed judgment of seisin under this section, and made up a record setting out the Writ of Summons, notice thereon and judgment, and suggesting the husband's death, that he died seized about A.D. 1853, and claiming damages (\$350) for detention from 27th October, 1864, and one-third of mesne profits from that date.

Defendant pleaded that demandant was not entitled to damages, because defendant was not tenant of the freehold till October, 1870, and that since latter date he had always been ready and willing to render dower, and had rendered same in Court.

Demurrer—1. That the plea furnished no answer to the demandant's claim for mesne profits, and damages, for the detention of dower, in the declaration mentioned.

2. That the mere fact of defendant having become tenant of the said lands and premises at a date, to wit, the 17th October, 1870, would not disentitle demandant in respect of the said premises prior to defendant having become tenant.

3. That mesne profits and damages for detention of dower were recoverable from the tenant to the writ, in an action of dower, for the whole period for which demandant by law entitled to claim damages, although tenant of the writ not tenant of the freehold during the whole of said period.

4. That if demandant entitled to dower, she was entitled to recover mesne profits and damages for detention of dower down to time of executing the writ of enquiry or assessment of damages.

G. Kerr, for the demurrer, cited *Roper*, H. & W. I. 440; *Gerard v. Gerard*, 1 Salk. 252; *Empey v. Loucks*, 8 U. C. 374.

McMichael, contra.

GWYNNE, J., delivered the judgment of the Court.

When this case was opened for argument by counsel for the demandant, Mr. McMichael asked leave to amend the

plea if the Court should be of opinion that the case is in a position to enable the Court to give any judgment which can be entered of record and enforced, by alleging that the heir-at-law of Simpson was tenant of the freehold from the death of Simpson until the 17th October, 1870, when he conveyed to defendant, and that the heir was always ready to render dower to the demandant until he conveyed to the defendant, and that the defendant has ever since been ready, &c., and hath rendered her her dower pursuant to the statute in that behalf.

We are of opinion that the only judgment which we can give upon this record is, that no judgment can be given which can be entered of record and enforced.

The argument of the learned counsel for the demandant was, that by the Statute of Merton there may be two judgments, the one for seisin of dower, and a separate one afterwards for damages assessed on a writ of enquiry of damages, and he contends that the same may be done under the recent statute of Ontario, 32 Vic. ch. 7; but we are of opinion that it cannot, and it becomes therefore unnecessary for us to determine—whether, in the case of a widow residing with the heir on the premises from the death of her husband for seventeen years, when he sells, up to which time the heir was always ready to have rendered dower, and could have successfully pleaded *tout temps pris*, and the grantee being always ready to render the dower from the time of the conveyance to him, and offering to do so, the widow can, by refusing to accept such assignment of dower otherwise than by action, demand from the grantee of the heir damages as for detention of dower and mesne profits during all the period that the widow herself with the heir was enjoying the benefit of, and was living upon, the premises, and whether the law is so rigid that there is no plea, by way of defence, open to the defendant which can relieve him from such a demand, other than the ancient course of vouching the heir to warranty. That is the naked contention of demandant's counsel.

The statute 20th Vic. ch. 40, sec. 18, enacted that no action for dower should be brought until one month's notice, in writing, demanding the same, had been given by the claimant to the tenant of the freehold. The effect of that wholesome and just provision was, that a claimant could claim no damages for *mesne profits*, or for detention of dower further back than the demand. This wholesome provision is repealed, with the rest of the Act, by 32 Vic. ch. 7, and different provisions are made. By this Act it is enacted that every action for dower shall be commenced by Writ of Summons in the form given in this Act. On every such writ shall be endorsed a notice, addressed to the defendant, to the effect following: "You are served with this writ to the intent that you may enter an appearance and denial that you are tenant of the lands mentioned in this writ, or that you may enter an appearance only; and take notice that unless within sixteen days of the service hereof you enter an appearance with or without such denial, the demandant will have a right to sign judgment to recover against you the dower claimed, with costs."

By the 7th section it is enacted that in case the demandant claims damages *for detention* of her dower, such notice shall contain a further statement that the demandant claims damages *for the detention* of her dower from some day to be stated in the notice.

Now, damages for *detention of dower* and *mesne profits* or thirds, are two very distinct things, and when we find the Legislature refer to the damages *for detention* only, we must, I think, conclude that this section has no reference to *mesne profits*.

The language of the Statute of Merton is very different from this, and is as follows: "Of widows which after the death of their husbands are *deforced* of their dowers and cannot have their dowers or quarantine without plea, who-soever deforce them of their dowers or quarantine of the lands whereof their husbands died seised, *and that* the same widows after shall *recover by plea*, they that be convicted of such wrongful deforcement shall yield damages

to the said widows; that is to say, the value of the whole dower to them belonging from the time of the death of their husbands unto the day that the said widows, by judgment of our Court, have recovered seisin of their dower, &c., and the deforcers nevertheless shall be amerced at the King's pleasure."

In *Coke on Litt.*, Title, Dower, sec. 361, it is shewn that the value of the dower from the time of the death of the husband is a thing distinct from damages for the detention thereof; for there it is said, "It is necessary for the wife after the decease of her husband, as soon as she can, to demand her dower before good testimony, for otherwise she may, by her own default, lose *the value* after the decease of her husband, *and her damages* for detaining of her dower." Many reported cases shew this distinction, wherein questions have arisen as to what may be recovered under the head of "damages for detention of dower;" but it is unnecessary to refer to them, for the distinction is well settled, and the demandant claims the two as separate and distinct.

The statute then, sec. 8, provides that "any defendant named in a writ may appear within the time appointed, and with the appearance may file a notice addressed to the demandant, setting out that he denies that he is tenant of the freehold of the lands mentioned in the writ, which denial shall, as against that individual defendant, be taken to admit the claim of the individual demandant to dower, as stated in the writ. The 17th section then provides for this case, that, upon such an appearance being entered, the demandant may at once *and without further pleadings* take issue on that denial and make up an issue-book, setting out the writ, the appearance and denial and the issue thereon, and may give notice of trial and proceed to trial as in personal actions, and if she obtain a verdict, she shall be entitled to costs and to enter judgment of seisin of her dower against such defendant. Now here it is to be noted that in this case, where the defendant admits the demandant's claim to dower, but denies that he is the tenant of the freehold, no provision is made for the recovery of any damages.

Then, again, by the 16th section it is provided that any defendant named in the writ may within the time appointed file an appearance and acknowledgment that he is tenant of the freehold of the land named in the writ, together with his consent that the demandant may have judgment for her dower therein, and may take the proceedings authorized by this Act to have the same assigned to her, unless the parties shall otherwise agree, and he shall forthwith serve the demandant, or her attorney, with a copy of such appearance, acknowledgment, and consent, together with an affidavit of the day of the entering and filing the same in the proper office; and in every such case, when the defendant so admits the right to recover, the demandant may enter judgment of seisin forthwith, and may obtain a writ of assignment of dower in manner hereinafter specified, but she shall not be entitled to tax or recover the costs of suit, or of entering such judgment against the defendant.

Now it is under this section that the defendant appeared

Now, clearly there is no analogy between the provisions of this section and the provisions of the Statute of Merton; nay, on the contrary, so different is the judgment of seisin hereby authorized from that referred to in the Statute of Merton that, upon judgment of seisin under this section, the demandant is deprived of those costs which upon a judgment of seisin under the Statute of Merton she would be entitled to. Again, the persons made chargeable with liability for damages are those who deforce widows of their dower, and keep them out of such dower, until after a count in dower, they shall recover by plea a judgment convicting the defendant of such deforcement. True it is that the statute was held to extend to a recovery of judgment upon *nil dicit*, to a count in dower, as well as on a plea; but the judgment referred to in the 16th section of 32 Vic. ch. 7, bears no analogy to a judgment recovered in an action of dower under the Statute of Merton, for under our statute there is no *count* under this section, and therefore there cannot be, as indeed

there is not, any plea or judgment by *nil dicit*, nor any recovery of a judgment in dower wherein, in the words of the Statute of Merton, the defendant can be said to be convict of such wrongful deforcement as should subject the deforcer to damages. The proceeding, then, to judgment, under the 16th section of 32 Vic., being in no sense a judgment recovered under the provisions of the Statute of Merton, or at common law, or in any sense analogous to a judgment under the Statute of Merton, there is no authority for charging the defendant with any damages at all, and therefore the judgment recovered under sec. 16 of 32 Vic. is final and conclusive, and there is no action therefore now pending wherein any writ of enquiry or assessment of damages can be had: the writ of summons in dower has served its purpose, and the final and only judgment which can be entered in the action commenced thereby is entered.

That this is the true construction to put upon the statute appears from the 18th section. That section provides that, "in case only an appearance be entered, the demandant may at once declare, and when damages are claimed in the writ they may also be claimed in the declaration, which may be to the effect following: A. B., widow, who was the wife of C. B., deceased, by her attorney, demands against the defendant the third part of (the land, describing it,) with the appurtenances, as the dower of the said A. B. of the endowment of C. B., deceased, heretofore her husband, whereof she has nothing (and if damages are claimed), and she also claims damages, *for the detention* from her of her endowment in the said lands, from the day of 18 , and she claims \$ "

Now here it is to be observed that it is only in the case of an appearance only being entered that any provision is made for there being a declaration, and that if damages are claimed, they must be claimed in a declaration filed upon an appearance only being entered, and that such damages can be claimed in the declaration only if they have been claimed in the writ of

summons, and that the damages so claimed are to be for *the detention* only of her endowment; and that it is not provided, as in the Statute of Merton, that the damages so recoverable shall be recovered from the death of the husband, but from a given day to be named, which seems reasonable to construe to refer to a day from which the defendant individually was guilty of a detention in fact, so as to exclude the construction contended for, by analogy to the Statute of Merton, to make the grantee from the heir liable for damages during the period that the heir was seised, although the heir himself would not have been liable if the writ had been against him. But further, the 43rd sec. of 32 Vic. ch. 7, enacts that "*in all cases not otherwise provided for by this Act the pleadings and proceedings shall be regulated by the law as it was in force in Upper Canada relative to writs and actions of dower before the 10th day of August, A.D., 1850,*" which law was alone the Statute of Merton. What case there could well be other than those provided for in the Act I fail to see, but if there be any, then the Statute of Merton is to apply. It appears therefore to me to be very clear that a judgment for seisin of dower, as the judgment obtained by the demandant was, against the defendant under sec. 16 of 32 Vic. ch. 7, is absolutely final and conclusive, and that there is no provision of law in such a case entitling a demandant to any damages of any nature or description, nor any mode of proceeding provided by law for ascertaining any such damages. If a demandant is still entitled to damages under the Statute of Merton, her proceedings would have to be taken as pointed out by the 43rd section; but if she claims damages for detention under 32 Vic. ch. 7, she must declare under the 18th section and so proceed to judgment. In the case of damages being so claimed the question will properly arise, whether the damages for detention, referred to in 32 Vic., are the same damages as are referred to in the Statute of Merton, and whether they are recoverable from the death of the husband, or from any other, and what time.

In the present case we simply determine that there is no question legally before us which we can adjudicate upon as upon a judicial proceeding whereupon any judgment can be entered of record, the demandant having taken judgment under the 16th section of the Act, which is final and conclusive.

MAUNDER V. ROYAL CANADIAN BANK.

Deposit receipt for money—Transfer—Notice of revocation—Payment to transferee after notice of revocation—Equitable defence—Demand before action.

Plaintiff deposited with defendants a sum of money and received from them the usual deposit receipt, stipulating for payment of interest provided the money remained not less than three months from date of deposit, and providing for fifteen days' notice to be given of its withdrawal, on which notice interest was to cease. Subsequently plaintiff signed his name thereto and delivered it to the endorsees. Before S. & Co. notified defendants of the transfer to them plaintiff gave them notice that he revoked and countermanded it, but defendants, notwithstanding, paid it over to S. & Co. on receiving an indemnity from them. Plaintiff subsequently made a formal demand upon defendants for the money, which was not complied with:

Quære, in an action by plaintiff against defendants, how far defendants were authorized to set up, in answer, as a payment good in equity, that the deposit receipt had been transferred by plaintiff to S. & Co. and that they had paid the amount to S. & Co. accordingly.

THE pleadings in this case are set out in 20 C. P. 125.

Besides the replications which were filed to the equitable pleas the plaintiff also joined issue upon these pleas, and the defendants joined issue upon the replications. With these issues in fact joined, the case was twice taken down to trial. At the first trial, before Hagarty, C. J., the jury were unable to agree, and upon the last trial, before Morrison, J., the jury rendered a verdict upon all the issues for the plaintiff.

The plaintiff proved that on the 7th January, 1869, he deposited with the defendants the sum of \$5443, for which he received a deposit receipt as follows :

"No. 159.

"Royal Canadian Bank.

"Woodstock, 7th January, 1869.

"\$5443.

"Received from John Maunder, of Cohoes, New York, five thousand four hundred and forty-three dollars, which sum shall be accounted for by this Bank to the said John Maunder, and will bear interest at the rate of four per cent. per annum, provided the money remain not less than three months from date of deposit, fifteen days' notice, to be given of its withdrawal, on which notice interest shall cease.

"For the Royal Canadian Bank,

"J. M. BURNS, *Agent*."

At the close of the plaintiff's case the defendants' counsel moved a nonsuit, upon the ground that the undertaking contained in the deposit receipt was, as he contended, an undertaking only to pay at the expiration of fifteen days after notice of withdrawal, and that no demand after the expiration of such fifteen days before action had been proved. The learned Judge refused to nonsuit upon this ground, but reserved leave to the defendants to move.

Upon the part of the defendants two members of the firm of Shepherd & Co. were examined as witnesses. They carried on an extensive milling business at a place called Cohoes, near Albany, in the state of New York, and the plaintiff and his sons were in their employment. These gentlemen gave evidence to the effect that they had, with the advice and assistance of Campbell Allan, superintendent of police at Albany, who was also called as a witness, detected the plaintiff in the commission of very extensive frauds and embezzlements committed by him upon them, and that they and the superintendent of police charged the plaintiff with commission of these frauds; that he at first denied them, but, being shewn some which had been detected, he confessed all, and admitted that he had abstracted from the defendants moneys under his control, by frauds in returns of sales made by

him to a very large amount, much exceeding, as they said, the amount of the deposit receipt, and he, for the purpose of making compensation for such frauds, agreed to transfer and deliver to Messrs. Shepherd & Co. the above deposit receipt with endorsement thereon as follows: "Pay A. D. Shepherd & Co.," and signed by the plaintiff. Much evidence also was gone into to shew the truth in fact of the alleged embezzlements, and a letter was produced, received by Shepherd & Co. from the plaintiff, dated 22nd February, 1869, tending to support their narrative of the transaction.

On the other side, the plaintiff himself was called, and he testified to the transaction being as stated by him in his replication, but he failed apparently to explain divers items of alleged fraud in his returns of sales as to which he was examined, and with which he was charged. The plaintiff's son was also called by defendants, and swore that Shepherd & Co. charged him with embezzling to the amount of \$500, and tried to get him to confess; but he said, he never did confess, and that he never did embezzle. This witness was also examined at large as to items of entries in the books, which were some in his handwriting, and in which entries, as was charged, fraud and embezzlement had been committed; but these entries he also seemed unable to explain. He also wrote a letter which was produced, dated 22nd February, to Shepherd & Co. This letter he wrote by his father's advice, but in his own language. The Messrs. Shepherd and Superintendent of Police (Allan) were re-called, and expressly contradicted the plaintiff and his son in every particular of their evidence relating to what took place upon the occasion of the deposit receipt being endorsed to Messrs. Shepherd & Co. All distinctly swore that the son's part in the embezzlement was never spoken of until after the plaintiff endorsed and delivered to Messrs. Shepherd & Co. the deposit receipt. Besides, the above evidence it appeared, upon the evidence of the defendant's agent, Mr. Burns, who signed the deposit receipt, that on the 19th February, 1869, he received a telegram from the plaintiff directing

him not to pay the amount of the deposit receipt to any one, and that he communicated this to the head office of the defendants at Toronto. He also said that about two days after the plaintiff called upon him at Woodstock, and again told him not to pay the money to any one, saying that he had passed away the receipt, but that it was upon an understanding that it should not be used. The plaintiff did not then ask for the money himself, but on the 10th March he did formally demand it. At the time of the plaintiff's interview with Mr. Burns in February, the money was in the bank; it was subsequently, as would seem, on the 6th March, paid over by the head office to Shepherd & Co., upon their giving a bond of indemnity. The plaintiff himself swore that when he saw Mr. Burns in February, he told him *how* he had given away the receipt, and that he directed him not to pay it.

The learned Judge left the case to the jury, with a direction that, if they believed the account of the transaction, as given by the Shepherds and Allan, supported by the plaintiff's own letter, they should find for the defendants, but that if they believed the plaintiff's account, their verdict should be for him.

The jury, after being out for some time, rendered a verdict for the plaintiff, and \$5,965 damages.

In Michaelmas Term last, *Harrison*, Q.C., obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial, or why a new trial should not be had, on the ground that the verdict was against law, evidence, the weight of evidence, and the Judge's charge.

The rule was twice argued, first in Michaelmas Term, and again during the present Term.

M. C. Cameron, Q. C., shewed cause, citing *Gould v. British America Insurance Co.*, 27 U. C. 473.

Harrison, Q. C., contra, cited *Dickson v. Equitable Insurance Co.*, 18 U. C. 246; *Ex parte Flintoft*, 8 Jur. 766; *Short v. Storm*, 8 Q. B. 358; *Lovelock v. Franklyn*, 8 Q. B. 371; *Hibblewhite v. McMorine*, 5 M. & W. 472.

GWYNNE, J.—When this case came before us on demurrer (20 C. P. 125) we held that the pleas, which were pleaded by way of defence upon equitable grounds, if proved, would establish a good bar to the plaintiff's action, because we considered the pleas, in substance, to allege a *bond fide* payment of the amount of the claim sought to be recovered in this action to persons to whom the plaintiff had for good and valuable consideration transferred all the right, title, and interest in equity, to receive and demand payment of the fund, notice of which transfer was alleged to have been given to the defendants. The case of *Jeffs v. Day* (L Rep. 1 Q. B. 372) seems to be a decision in support of our judgment. We also, upon that occasion, held that the replications pleaded to those equitable pleas, if true, (which upon demurrer we took them to be) disclosed matter which displaced the pleas as valid equitable defences, not upon the ground that the replications shewed that Shepherd & Co., to whom the deposit receipt was said to have been assigned, had no equity whatever themselves which they could assert against the plaintiff, but that, assuming the state of the facts to be as disclosed in the replication, a Court of Equity could alone administer the equity of all the parties interested, and that therefore such matters, if pleaded by way of defence upon equitable grounds, could afford no answer to the legal claim presented by the plaintiff arising out of the defendant's contract with him.

There is nothing, as it appears to me, in the point of non-suit; for, assuming the contract to be to pay fifteen days after notice of withdrawal or demand (although it seems to me that this is a provision relating to interest wholly), still, the demand of the 10th March was sufficient, and the money became payable within fifteen days thereafter without any further demand. No demand is necessary previous to the commencement of an action on a note payable on demand (*Pierce v. Fothergill*, 2 Bing. N. C. 117), nor can any but the one demand be necessary in the case of an undertaking to pay fifteen days after demand. Upon a careful consideration of the evidence, I must confess that it

does appear to me that the evidence greatly preponderates in favour of the account of the transaction of the transfer of the deposit receipt to Messrs. Shepherd & Co., as given by them and the witness Allan, confirmed, as it seems to me, by the letters which were produced from the plaintiff and his son.

In the present condition of the record we do not think the case is ripe for a conclusive judgment upon the question how far a banker is authorized, in answer to an action-at-law brought by his undoubted legal creditor, to set up, as *a payment good in equity*, a payment made to persons in the position of the Messrs. Shepherd, upon an endorsement such as appears in this case upon a deposit receipt, after the legal creditor had given express notice to the banker, with whom his money was deposited, not to recognize it, for that he had countermanded the order (before any notice had been given to the banker by Shepherd & Co., with a view to completing their equitable assignment). That point will be more ripe for decision if a jury shall render a verdict finding that the consideration for the endorsement was as alleged by Shepherd & Co., and not as alleged by the plaintiff; and if the question shall again come up we hope that Counsel will address themselves more to the consideration of the doctrine of equitable assignment, and the duty of the legal debtor to his creditor in such a case as the one before us presents, and to a discussion of the principle upon which a legal debtor can set up payment to another person claiming under his creditor as an equitable bar to the legal action of his creditor.

Upon the record as it now stands judgment cannot be given in favour of the defendants. Their plea is by the verdict of the jury found to be untrue upon the issue joined thereon; but at the same time there is an issue joined upon the replication which, although found in favour of the plaintiff, establishes that the transfer to Messrs. Shepherd & Co., was, by the plaintiff's admission, to be a security to them in respect of matters which cannot be adjudicated upon in this suit, but must, to be conclusively determined, form the

subject of a suit in chancery. If a verdict should be entered in favor of the plaintiff upon this record, resort will have to be had to a Court of Equity to administer the equities which the plaintiff, by his evidence and his replication, admits to exist. Strongly impressed as we are with a conviction that as to the purpose, intent, and consideration of the transfer and delivery of the deposit receipt to Messrs. Shepherd & Co., the evidence preponderates in favor of the evidence as given by him, and against that as given by the plaintiff, we think the defendants should, if they desire it, have another opportunity of having that question tried, and upon the trial, instead of a mere verdict in favor of the plaintiff or defendants, the parties may consider whether it is not desirable that the jury should be asked to find a special verdict expressly stating what were the terms upon which, and the consideration for which, and the intent with which the plaintiff delivered the deposit receipt, with the endorsment thereon, to the Messrs. Shepherd & Co.

In view, however, of the possibility of these facts being found to be as asserted by the plaintiff, it will be well for Counsel to consider whether a Court of Equity, in a suit by the parties in whose interest the defendants appear to be defending this suit, is not the proper place and mode for finally adjudicating and concluding the matters in question, instead of a Court of Law, upon an equitable plea of payment, pleaded by a debtor to an action at law brought by his acknowledged creditor.

The rule will be for a new trial upon payment of costs.

HAGARTY, C. J.—After very long consideration I have come to the conclusion that the proper course is to let the defendants have a new trial on payment of costs.

It may be well that another jury should be asked whether the version of the plaintiff or of the defendants, as to the alleged transfer, is correct.

The case in any respect is surrounded with many difficulties. The very unusual and, as I think, unprecedented course adopted by the defendants in paying this money to

Shepherd & Co., with full notice of their original depositor's objections to their so doing, has naturally created these difficulties.

My brother Gwynne has pointed out the possible necessity that may arise of having the rights of all the parties adjusted by a Court which would have them all before it. In the meantime I think another attempt should be made finally to ascertain the facts.

GALT, J., concurred.

Rule absolute for new trial, on payment of costs.

HARLING V. MAYVILLE.

Replevin—Distress for School rates—Levy according to valuation of part only of taxable property—Exemption as contributing to Protestant separate school—Pleading.

In replevin for plaintiff's goods, defendant made cognizance justifying as bailiff of a collector of school rates under a warrant from him. Plaintiff pleaded, first, that the rate was bad, as not being levied according to the valuation of the whole taxable property in the school section, as expressed in the assessor's and collector's roll, pursuant to the statute, but that it was levied wrongfully upon only three-fourth parts of such taxable property; secondly, that at the time said rate was imposed there was a Protestant separate school which had been long before established, and that plaintiff for a long time before the imposition of the rate had been and at the time of its imposition was sending his children to said separate school. To the first plea defendant replied that the rate was duly imposed, because at the time of its imposition and long before then there was a union separate school of the townships of, &c., for coloured people, the limits of which took in the whole of the section in which plaintiff resided, and the trustees of said section properly omitted the names of the coloured people in said section from said rate-bill. *Held*, on demurrer, reversing the judgment of the County Court, that the first plea was good, but the second bad. *Held*, also, affirming the judgment of the County Court, that the replication to the first plea was bad.

REPLEVIN, and appeal from the County Court of the County of Essex.

Plaintiff declared against defendant for the wrongful taking and detention of certain goods and chattels of plaintiff, against sureties and pledges.

Defendant well acknowledged taking the goods and chattels in the declaration mentioned, on the premises of plaintiff, on lot No. 4, in the 6th concession of the township of Anderdon, in the county of Essex, and justly, &c., as and for and in the name of a distress for a school-rate, which, as he said, was imposed by the trustees of school section number four in the township of Anderdon, in which section plaintiff was an inhabitant, and owner of property, wherefor he was assessed and liable to be rated in respect thereof; that the rate so imposed on plaintiff was \$11; that a rate-bill and warrant, in which plaintiff's name was inserted for the said sum of \$11, was delivered by the said trustees to one Gabriel Boussie, who was the collector duly appointed for the said school section, and defendant, as the bailiff of the said Boussie, before the taking, made a demand upon plaintiff for payment of the rate, and that the plaintiff refused to pay, and that the rate still remained due and unpaid.

The plaintiff pleaded thereto, in substance, 1, That the rate was bad, inasmuch as it was not, as he alleged, levied according to the valuation of the whole taxable property in said school section, as expressed in the assessors' and collector's roll of the township, pursuant to the statute, but, on the contrary, that it was levied wrongfully upon only three-fourth parts of such taxable property; and 2, That at the time said rate was imposed there was a Protestant separate school which had been long before then established, and that plaintiff, for a long time before the imposing the rate, had been, and at the time the rate was imposed was, sending his children to the said Protestant separate school.

To the first of the above pleas defendant demurred, and also replied that said rate was duly imposed, because that at the time said rate was imposed, and long before then, there was a union separate school of the townships of Anderdon and Malden for coloured people, the limits of which said union separate school took in, and embraced the whole of said section number four of the township of

Anderdon, and the school trustees of said section number four properly omitted and left out the names of the colored people in said section from the said rate-bill. To the second of the above pleas defendant replied that no return was made by the local superintendent of schools for said township of Anderdon to the trustees of said school section number four of said township in which such separate school was established, either after the 30th June, 1870, or at any time before, stating the names of all persons who, being Protestants, contributed or sent children to such separate school, pursuant to the statute in that behalf.

Defendant also demurred to this plea, and plaintiff demurred to defendant's replications to his pleas.

The grounds of demurrer stated to plaintiff's pleas were, 1, that the pleas shewed nothing which made the distress levied by defendant illegal; 2, that the collector was not bound to inquire into the legality of the rate; that the rate-bill and warrant were a sufficient protection for him, and so for defendant who distrained as his bailiff; and 3, that the pleas did not shew plaintiff to be in law exempt from the rate.

Plaintiff's grounds of demurrer to defendant's replication to plaintiff's first plea were, that the replication did not allege that the persons whose names were omitted from the rate-bill were exempt from the rate, nor any legal excuse for omitting their names; nor did it allege that they were sending children to, or supporting a separate school.

The grounds of demurrer to defendant's replication to the second plea were, that plaintiff's right of exemption from the common school rates could not be affected by the omission of the local superintendent to make the return in said replication mentioned.

The learned Judge of the County Court of the County of Essex having given judgment upon the argument of the demurrers before him, in favor of the defendant on his demurrer to plaintiff's first plea, and on plaintiff's

demurrer to defendant's replication to plaintiff's second plea, and in favor of plaintiff on the demurrer to plaintiff's second plea, and on plaintiff's demurrer to the replication to the first plea, plaintiff appealed.

Robinson, Q.C., for the appellant, cited *Pattypiece v. Mayville*, 21 C. P. 316; *Corporation of Essex v. Bullock et al.*, 11 C. P. 322.

Osler, contra.

GWYNNE, J., delivered the judgment of the Court.

As to the plaintiff's first plea, the learned Judge was of opinion that the plea was bad, upon the ground that the cognizance alleging plaintiff to be an inhabitant of the school section, owning property therein liable to be rated, and this not being disputed by the plea, the jurisdiction of the trustees to make the rate was established, and that it must be presumed, until the contrary be shewn by plaintiff, that the trustees had good reason to exclude from the operation of the rate the fourth part alleged in the plea to have been excluded, and to impose it only on the remaining three-fourths, and that the rate was good until set aside on appeal. Upon the appeal before us it was also urged that the plea was bad for the further reason that, as was contended upon the authority of *Spry v. McKenzie* (18 U. C. R. 161), the defendant, acting as bailiff of the collector, under a warrant signed by the trustees of the school section, could not be held liable in replevin, although the rate might be illegal; that the defendant was not required to see to the legality of the rate. In that case, which was replevin against an inn-keeper, after giving judgment in favor of the defendant, founded on an inn-keeper's right of detainer for his lien, the late learned Chief Justice, Sir John Robinson, proceeds to make the following observations, not in themselves necessary for the decision of the case: "At present, we are not satisfied that the plaintiff could have sustained either trespass or trover for the horses, taking the facts to

be as they are stated to have been in the replication ; and it is plain on the record that this is an action of replevin brought under our Replevin Act, which gives replevin wherever trespass or trover would lie, and is not a case of replevin following a distress for rent ; but besides this, if the plaintiff's action rests entirely upon the right to distrain, the bailiff, Sweet, would not be liable as a wrong-doer for executing a warrant, legal upon the face of it, made to him by public officers who had authority to make such a warrant by Act of Parliament."

In *Bac. Abr.*, "Replevin, A.," replevin is defined to be a re-delivery to the owner, by the sheriff, of his cattle or goods, distrained *upon any cause*, upon surety that he will pursue the action against him that distrained. If he pursue it not, or if it be adjudged against him, then he who took the distress shall have it again, and for that purpose may have a writ of *retorno habendo*. In this action both the plaintiff and defendant are called actors, the plaintiff suing for damages, and the defendant to have a return of the goods or cattle.

Rooke's case 5 (Coke, 99b), was an action of replevin against one who justified the taking by authority of a commissioner of sewers to levy a rate imposed on one Carter, and the rate was held bad, and judgment given for the plaintiff, because the rate had not been imposed upon all persons liable to be rated. In *Buller's Nisi Prius*, p. 52, it is said that replevin may be brought in any case where a man has had his goods taken from him by another. *Com. Dig.* Title "Replevin" is to the same effect. In *Shannon v. Shannon* (1 Sch. & Lef. 327) Lord Redesdale says that replevin is not confined to a taking by a distress alone, but is an action which may be founded upon any taking by any party. In *George v. Chambers* (11 M. & W. 158) Lord Abinger, C. B., held that the 19th section of 43 Eliz. ch. 2, which gives a short form of statutory plea, avowry, cognizance, or justification for all distresses under the Act, namely, the Poor-law Act, to the effect that the matter complained of was done under the authority of the Act,

was a statutory recognition that replevin lies for a distress made to levy a poor rate; and in the same case Baron Parke says, "Though in ordinary practice it is applied only to a distress for rent, yet replevin is, at *common law*, a remedy applicable in all cases where goods are improperly taken;" and further, in relation to the justification set up in that case he says: "If the plea does not disclose a good defence the defendant must stand in the same situation as an ordinary wrong-doer."

In *Mellor v. Leather* (1 El. & Bl. 628) Lord Campbell, giving judgment, says, "We are of opinion, upon the authority not only of the text books, but of decided cases, that replevin will lie when goods are unlawfully taken though not as a distress."

In *Fletcher v. Wilkins* (6 East. 283) it was held that replevin was not an action within the meaning of 24 Geo. II. ch. 44, sec. 6, which protects constables from all actions brought against them for any thing done in obedience to any warrant of a justice of peace until demand for perusal and a copy of the warrant. *Morrell v. Martin*, (3 Man. & Gr. 581) was an action of replevin against a constable for taking the plaintiff's goods under a magistrate's warrant to levy an assessment for repair of a highway. The defendant pleaded a special plea in bar, justifying the taking and detention only, but claiming no right to a return of the goods, under a warrant made by two justices delivered to the defendant, a constable, to be executed to levy a rate alleged to have been duly assessed on one H. for the repair of highways, and it was decided that, in the case of a justification at common law by a constable under a warrant of a justice of peace, the plea is bad which does not shew the justice had jurisdiction over the subject matter upon which the warrant is granted. The case seems to be an authority that, in replevin as in trespass, the defendant may, if he pleases, confine his defence to a justification of the taking and detention, without asserting a right to a return of the goods replevied, and that if there be no statutory plea given to the defendant in the

particular case, and he is therefore obliged to have resort to a plea of justification at common law, of his acting in obedience to a warrant granted by an authority having limited jurisdiction, he must, in replevin as in trespass, shew that the warrant issued in a case which fell within the limited jurisdiction.

In *Collett v. Lord Keith* (2 East. 261) Lawrence, J. had said that, in justifying under process of inferior courts, it is necessary not merely to allege generally that they had jurisdiction over the subject matter, but to state what the jurisdiction was, and then allege such facts as may enable the Superior Court to judge whether the Court below had jurisdiction or not.

In *Mellor v. Leather and Clough* (1 El. & B. 628) arose the question to which, as it seems to me, Sir John Robinson was alluding in the passage extracted from *Spry v. McKenzie*. There, in an action of replevin, on a plea of *non cepit*, it was held that under the statute 5 and 6 Wm. IV. ch. 76, secs. 76 and 133, the defendant might shew that he was a constable for a borough, and took the goods, within the county wherein the borough was situate, on a charge that they had been stolen. The 76th section of the Act gave to the constable of a borough authority to act without the borough within the county wherein the borough was situate, and in any county within seven miles of the borough; and by the 133rd section it was enacted, for the protection of persons acting in the execution of the Act, that *all* actions and prosecutions, to be commenced against any person for any thing done in pursuance of the Act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise.

The effect of that decision is, that under the special provisions of that statute, *non cepit* being the general issue in replevin, the constable was entitled under that plea, which is a plea asserting no right to a return of the goods, and does not authorize a judgment for a return, to give in evidence the justification that he acted only as a

constable; but where a defendant *well acknowledges* the taking and detention, and justly, &c., under circumstances pleaded, which, if found, for the defendant, entitle him to a judgment for a return of the goods, there the defendant becomes an actor in the suit, and it seems, upon principle as well as authority, that he should shew a title to the goods, so as to support a judgment for the return of them to him; and accordingly in the next term after that in which *Spry v. McKenzie* was rendered in the Queen's Bench, this Court has so decided in *Haacke v. Marr* (8 C. P. 441), wherein a collector of school rates was the defendant.

In *Coleman v. Kerr* (27 U. C. p. 14) Draper, C. J., adheres to *Haacke v. Marr*, as laying down the true doctrine on an avowry in replevin. He seems to distinguish it from *Spry v. McKenzie*, upon the ground that, in the latter case, the defendant's plea was not in the nature of an avowry, but of justification of taking and detention in bar of the action. But the defendant in *Spry v. McKenzie* did assert a right in himself still to the possession of the horse replevied until he should be satisfied for his lien, or to sell to satisfy the lien, and so it did in substance amount to an avowry and entitled the defendant to a judgment for a return; moreover, Sir John Robinson does not address his observation to the frame of the plea, but rather to a defence which, if Sweet, the bailiff, had been a defendant, he suggests might have been open to him, and if *he* would not be liable in trespass or trover, the innkeeper would not be liable who took the horse from his hands to feed and support it. What seems to me to have been passing in the mind of the learned Chief Justice, when making those observations in *Spry v. McKenzie*, was, that the constable might, in replevin as in trespass, confine his defence to a justification of the taking of the horse, not asserting any right to a return; and he certainly seems to have been of opinion that, in the case before him, the constable could have justified simply under a warrant good upon its face, and he adds that if *he* could justify the taking, he could give the animal to the innkeeper to feed and take care of,

and so that the innkeeper would acquire a lien which would enable him to *avow* in replevin, and would entitle him to a return unless his lien should be satisfied. The result of the authorities, however, appears to me to be that a constable, if there be any statute giving him the privilege of setting up the special matter as a defence under the general issue, in replevin, may avail himself of that mode of defence, or he may, by a plea at common law, confine his defence to a justification of the taking and detention only, under a warrant, without asserting a right to a return of the goods replevied; but if the authority issuing the warrant to him be of limited jurisdiction, he must shew that it had jurisdiction in the case in which the warrant was granted; but if he pleads any plea which sets up any interest in or right to the goods replevied, authorizing a judgment for a return being entered, if the plea should be found for the defendant, he becomes an actor and must shew a perfect title to have the goods returned to him.

If it shall be contended that the decision in *Mellor v. Leather* and *Clough* is that which is to govern, and not *Fletcher v. Wilkins* and *Waterhouse v. Keen* (4 B. & C. 211), and *Gay v. Matthews* (4 B. & S. 425), in the construction to be put upon 22 Vic., ch. 126, U. C., in an action of replevin against a constable for a wrongful taking of a plaintiff's goods, that question will have to arise upon a plea of *non cepit*, which sets up no claim to, and does not warrant, a judgment for a return. There would be an incongruity in holding, as has been contended here, that a defendant, who, by his pleading, had asserted a right to the goods, warranting, if established, a judgment for a return, should be heard upon argument to abandon that assertion of title, and that upon the strength of such abandonment he should have judgment in his favor upon the pleading, which judgment being entered upon the record would entitle him to the writ *pro retorno habendo*.

But the learned judge of the County Court was of opinion that the plea affords no answer to the cognizance, upon the ground that, in his judgment, it well appears that

the trustees had jurisdiction to impose upon the plaintiff the particular rate, to levy which his goods were seized. No doubt the trustees had jurisdiction to impose an assessment on the plaintiff unless he had some special exemption, which, if he had, should be shewn by him; but in *Rooke's* case also the commissioners of sewers had jurisdiction to impose *an* assessment, but not the partial one which they affected to impose. The jurisdiction of the common school trustees is limited to the imposing an equal rate in the pound upon *all* the taxable property in the school section, according to the valuation of such property appearing on the assessor's or collector's rolls for the year in which the rate is imposed. The plaintiff, in his plea, in substance alleges that they have not exercised that jurisdiction, but that they have wrongfully and without authority affected to impose a rate upon three-fourth parts only in value of the taxable property in the school section. If this be true, as is admitted by the demurrer, the trustees have not acted within their jurisdiction, but the learned Judge was of opinion that it is to be presumed, notwithstanding, that they have. If the fact be that one-fourth part in value of the property appearing on the assessor's roll has been exempted from the rate imposed by the trustees, by reason of some ground of exemption contained in sub-sec. 13 of sec. 27 of ch. 64, or in ch. 65, that is matter which, according to the recognized principles of pleading, should proceed from the trustees in a replication to the plea, as matter peculiarly within the knowledge of the trustees: *Gillies v. Wood*, (18 U. C. 357); and the effect of such a replication would be to shew that, in truth, although *prima facie* and apparently the rate is imposed upon only three-fourth parts of the taxable property on the assessment roll, yet that, by reason of the exemptions pleaded, this is the true and full amount of the property liable to the particular rate, and that therefore the trustees have acted within their jurisdiction, and that the rate is good.

There is no appeal provided by the Act; nor if the trustees do their duty, does there seem to be any occasion

for one ; for the whole duty they have to discharge is to impose a rate equally in proportion to valuation on the assessment roll upon the whole taxable property in the school section.

In effect the issuing of their warrant is the imposition of the rate, and the party affected by it has no notice of it until called upon by the bailiff to pay. Unless therefore under this process of replevin, there is no protection that I can see to any one against an illegal rate, and that this remedy is open to a party aggrieved I have no doubt. The plaintiff having then by his plea asserted that the rate levied upon him was not legally imposed, inasmuch as it was not imposed upon all the taxable property liable to pay it, and this assertion being admitted by the demurrer, judgment should be for the plaintiff on the demurrer to his first plea. We agree with the learned Judge that, for the reasons alleged by him, and assigned as grounds of demurrer to the replication to the first plea, the judgment is properly given in favour of the plaintiff upon that demurrer.

Then as to the second plea. The 7th sec. of ch. 65 of the Consolidated Statutes of U. C. exempts each Protestant, sending children to a Protestant separate school or subscribing thereto, as in the section provided, from payment of all rates imposed for the support of common schools in the school sections wherein such separate schools exist. Such exemption, by the 8th sec., shall only exist so long as such persons send their children to, or subscribe for, the support of such separate school. The person then entitled to exemption from liability to common school rates, upon the ground of his sending his children to a Protestant separate school, or of his subscribing thereto, should be himself a Protestant. The plea does not aver the plaintiff so to be, but no objection upon this ground was urged before us, or as would seem in the court below : the argument turned wholly upon the sufficiency of the replication to that plea. Now that replication alleges, as a reason why the exemption professed to be set up by the plea

should not prevail, that the local superintendent of schools for the said township of Anderdon, neither after the 30th June, 1870, nor at any time before, made a return to the trustees of the said school section No. 4, *stating the names of all the persons who, being Protestants, contributed or sent children to such separate school, pursuant to the statute in that behalf.*

Now, this mode of pleading appears to me to be open to very grave exception, and yet no exception is taken to what appears to be an apparent imperfection in the replication. The allegation involves an admission that, although the local superintendent may not have made to the trustees a return of *all* persons who, being Protestants, contribute or send children to the separate school, he may nevertheless have made a return stating the names of some of such persons whereof the plaintiff may be one; moreover, although the local superintendent may have neglected to send a proper return, as required by the statute, to the trustees, he may nevertheless have sent a complete return to the clerk of the municipality. Now, the object of this return being required to be sent to the clerk of the municipality is to enable him, as he is by the 15th sec. of ch. 65 required, to "exclude the names of all such persons from the collector's roll for the general or other school rate." By the 16th sec. the clerk or other officer of the municipality, within which such separate school is established, having possession of the assessor's or collector's roll of the municipality, shall allow any one of the trustees or their authorized collector to make a copy of such roll, so far as it relates to the school section, so that the trustees may have full knowledge, through the medium of such copy, of the return made by the local superintendent to the clerk of the municipality of the names of all persons exempt from common school rates, upon the ground of their supporting or sending children to a separate school, although the local superintendent may have neglected to send such return to the trustees; and having such knowledge, the 14th section of ch. 65 is peremptory that the trustees *shall not*

include in their school rolls any person whose name appears on such last-mentioned return, namely, the return in the 13th section referred to, whether sent to the clerk of the municipality alone, or to him and also the trustees. However, agreeing as I do with Burns, J., in his observations in *Re Ridsdale and Brush* (22 U. C. 124), "that the Legislature intended the provisions creating the common school system, and for working and carrying that out, to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favour," I think the better judgment to give upon these demurrers arising out of the second plea, will be to pronounce that plea to be insufficient in law, upon the principle that it lies upon the plaintiff, claiming exemption as a separatist, to aver and prove all those exceptional matters taking him out of the general rule, and as the 12th sec. of ch. 65 requires the trustees of each separate school, on or before the 30th day of June and the 31st day of December in each year, to transmit to the local superintendent of schools a correct return of the names of all Protestants who have sent children to, or subscribe as aforesaid for the support of such separate school during the last preceding six months, in order that the local superintendent may be able to make his return to the clerk of the municipality and to the common school trustees, I think that the party claiming exemption from the general rule of *primâ facie* liability to common school rates should shew that the trustees of his separate school have taken the steps pointed out by the law to procure for the separatists the desired exemption. I think, therefore, that the judgment should be for the defendant on the demurrer to the plaintiff's second plea, as not sufficiently establishing the peculiar exemption from liability to common school rates which the plaintiff claims. So far, however, as the plea and the demurrers arising thereout are concerned, the question is one of costs only, as we are of opinion that the plaintiff is

entitled to judgment upon the demurrers to the first plea and to the replication thereto.

Judgment accordingly.

CLEMENTS V. MARTIN ET AL.

Ejectment—Statute of Limitations—Right of entry—Date of.

Where one was in possession of land, claiming as assignee of a bond for a deed, made by the owner in fee, whose estate B. took by devise, *Held*, that an entry by B. *animo possidendi*, and that B.'s enclosing the land with a field of his own adjoining, caused the Statute of Limitations to cease to run as against B., and that the right of entry of B. and those claiming under him dated from an *entry* thereafter made by the defendants upon B.'s possession so obtained.

EJECTMENT for about $\frac{1}{4}$ of an acre of land, part of W. $\frac{1}{2}$ of W. $\frac{1}{2}$ of lot 9, in front concession of Dover East, County of Kent.

Plaintiff, at the trial, which took place before Richards, C.J., without a jury, shewed a perfect paper title as grantee of Joseph Crow, devisee of Robert Crow, who died seised in September, 1850.

Defendants claimed by 20 years' possession, which they contended commenced in 1849, in virtue of a bond for a deed, said (but not produced) to have been executed by Robert Crow to one Dolph, through whom the defendants claimed.

As to so much of the premises upon which a barn stood, it was admitted by defendants that, although it was, as they contended, on the piece of land alleged to have been agreed to be sold by Robert Crow to Dolph in 1849, it was at the same time agreed that Robert Crow and his representatives should retain possession of the barn so long as it should stand, and that, accordingly, they did retain actual possession of it until it was blown down in 1852, from which time only the defendants dated their possession of the land on which the barn stood.

A verdict was rendered for plaintiff as to so much of the premises whereon a barn stood in 1850, and for

defendants as to the residue, with leave reserved to plaintiff to move to enter a verdict for him for the whole, and to defendants to move to enter a verdict for them as to the part on which the barn stood, that is, for the whole of the premises also.

A rule was accordingly obtained by *C. Robinson*, Q.C., on the leave reserved, on behalf of defendants, and by *Becher*, Q.C., on the leave reserved, on behalf of plaintiff.

Robinson, Q.C., supported his own rule, and shewed cause to the other, and cited *Leith's Black.*, 210, 215; *Doe Groves v. Groves*, 10 Q.B. 436; *Jones v. Cleveland*, 11 U.C.1; *Cowan et al. v. McIntyre et al.*, 19 U. C. 607; *Doe Dayman v. Moore*, 9 Q. B. 555; *Doe Gooday v. Carter*, 9 Q. B. 863.

Becher, contra, cited *Locke v. Matthews*, 13 C. B. N. S. 753; *Doe Shepherd v. Bayley* 10 U. C. 319; *Warssam v. Vandenbrande*, 17 W. R. 53; *Leith's Black.*, 210-214; *Pinhorn v. Souster*, 8 Ex. 763; *Randall v. Stephens*, 2 E. & B. 646; *Doe Carter v. Barnard*, 13 Q. B. 945; *Doe Stanway v. Rock*, 4 M. & G. 30; *Doe Birmingham Canal Navigation Co. v. Bold*, 11 Q. B. 127.

GWYNNE, J., delivered the judgment of the Court.

The case must, I think, be determined upon the evidence of what took place in the fall of 1859 and the spring of 1860. Whether a bond for a deed was or not executed by Robert Crow to Dolph, the evidence sufficiently justifies the conclusion that Dolph entered upon the premises in question in virtue of some agreement made with Robert Crow in his lifetime. We may assume it to be established, also, by the evidence; that Dolph, until he transferred his possession to William Crow, and William Crow thereafter, was tenant-at-will of Robert Crow in his lifetime. I think it sufficiently appears by the evidence that Joseph Crow, in the fall of 1859, when no one was actually living upon the premises in question, and with the intention of asserting his title to them and of resuming possession thereof as his own property, being in actual occupation of the

adjoining land, entered upon the premises in question and fenced the same on its outer sides, but having no fence separating them from his adjoining land, and that, without any interference offered by any person, he ploughed and sowed with grass the premises in question, making them to correspond with his own undoubted adjoining property. It appears that he continued in possession under these circumstances for some time, for in the spring of 1860 William Crow re-entered on the land, asserting title under the alleged bond to Dolph, said to be assigned to himself. Joseph then summoned William before a magistrate for this re-entry and for the acts done by him on the land, but the magistrate very properly declined to interfere, as a question of title was raised before him. William himself says that at this time he offered to pay to Joseph the balance of the money which William admitted was due under the agreement for purchase made by Dolph, of which William claimed to be assignee. Now, whether this offer, so made after the termination of the prior tenancy, which undoubtedly would have been determined by Joseph's entry in 1859, although William Crow had then been in visible occupation of, and had continued in possession of the premises, is evidence of a new tenancy-at-will, I think it unnecessary to determine; nor is it necessary to enquire whether, if the continuing occupation was as a trespasser or as a tenant at sufferance only, the plaintiff could recover—*Doe Gooday v. Carter*, 9 Q. B. 863; *Randall v. Stevens*, 2 El. & Bl. 641; *Locke v. Matthews*, 13 C. B. N. S. 754—for I think that the evidence sufficiently shews that in 1859 Joseph Crow, as devisee of Robert and in assertion of his title in fee, resumed possession of the premises in question, and re-annexed them to the residue of the land, and continued in such possession until William Crow, some time afterwards, re-entered upon him. Possession was taken by Joseph *animo possidendi*, and, as is said by Lord Campbell, in *Randall v. Stevens*, "whether possession was retained by him an hour or a week must be immaterial." He

was lawfully in of his fee simple title, and by nothing that had previously happened could his right in respect of the Statute of Limitations be at all prejudiced. I cannot well conceive what plainer exercise of his fee simple rights Joseph could have shewn than by entering, and not *merely* entering but fencing, except on the side adjoining his own orchard, and sewing the premises in grass to correspond with his orchard, and throwing the premises in question with an adjoining field into one, and so occupying for, it would seem, a period of some months. I entertain no doubt that, when William Crow re-entered in 1860, under whatever claim of title, Joseph could have sustained an action of trespass, *qu. cl. fregit*, for such re-entry; and his right, and the right of the plaintiff as claiming through him, must thenceforth date from the right of entry which accrued first to Joseph upon William re-entering in 1860 and evicting him, and that right of entry must continue until twenty years thereafter shall have elapsed; so that it is quite unimportant, except as affecting a right to a demand of possession, and which was given before action brought, whether or not a new tenancy-at-will was afterwards created. The entry by William in 1860, was a trespass, and the continuance of that act cannot deprive Joseph, or the plaintiff, as deriving title from him, of the right to recover in this action. The case of *Warssam v. Vandenbrande* in the C. P., as reported in the *Weekly Reporter*, p. 53, in November, 1868, strongly supports this view. The plaintiff's rule should therefore be made absolute, and that of the defendants' discharged.

Judgment accordingly.

McCLEVERTIE V. MASSIE.

Wrongful seizure of goods—Evidence of liability.

Plaintiff issued an attachment in insolvency against one M., and obtained for H., his book-keeper, a warrant as sheriff's bailiff, with which he despatched him to where M. carried on business, instructing him to see about the goods in his possession, and, as H. thought, telling his solicitors the goods were to be seized. H. accordingly went and seized the goods, which were at the time being sold at auction for plaintiff, who claimed to have bought them from M. On his return H. informed defendant, who approved of what he had done. It also appeared that defendant's attorney had given the writ to the sheriff, with instructions to seize the goods :

Held, following *Slaght v. West*, 25 U. C. 391, that there was evidence to go to the jury of defendant's liability for the seizure.

This was an action, tried at the last Spring Assizes at Barrie, for a wrongful seizure of the plaintiff's goods. The facts appeared to have been, that the defendant had issued an attachment in insolvency against one McCarroll,* who was a shop-keeper in Orangeville, while plaintiff lived in Guelph ; that defendant's book-keeper, one Hurrell, by defendant's directions, procured a warrant for himself, as sheriff's bailiff, and went to Orangeville, where defendant had instructed him to go and enquire about McCarroll's goods. The witness also thought that defendant had said to his solicitors that the stock at Orangeville was to be seized under the writ. He accordingly seized the goods at Orangeville, which were at the time being sold by auction for plaintiff, who claimed them as purchaser from McCarroll. A man named German was put in charge of the goods by Hurrell, who returned to Guelph and communicated to defendant what had taken place, when defendant said he had done rightly.

Defendant's attorney was called, and proved that he handed the writ to the sheriff, instructing him to seize McCarroll's goods at Orangeville, informing him what the business was.

At the conclusion of the plaintiff's case the learned Judge nonsuited the plaintiff, on the ground that defendant did not appear to have been responsible for the seizure.

McCarthy obtained a rule to set aside the nonsuit, to which *Harrison*, Q. C., shewed cause, citing *Wilson v. Tumman*, 6 M. & G. 241; *Slaght v. West*, 25 U. C. 391; *Woollen v. Wright*, 1 H. & C. 554; *Kennedy v. Patterson*, 22 U. C. 556.

McCarthy, contra, cited *Ford v. Leche*, 6 A. & E. 699; *Gray v. Fortune*, 18 U. C. 253; *Phillips v. Findlay*, 27 U. C. 32.

HAGARTY, C.J., delivered the judgment of the Court.

We cannot distinguish this case from that of *Slaght v. West* (25 U. C. 391). Both cases are clearly different from that suggested by Mr. Harrison, where a party merely gives a writ to the sheriff against a man's goods, and the officer seizes those of a third person without any directions or intervention of the plaintiff.

In *Slaght v. West*, defendant's attorney gave the *fi. fa.* to the sheriff at Brantford against one Beare, and told him that Beare lived in Paris, and was carrying on business, selling goods or fruit. A seizure was then made at Paris at a shop where Beare was apparently carrying on business. The plaintiff claimed the shop and goods to be his, and notified the sheriff, who told the attorneys, and asked should he withdraw: they said they wanted some days to make enquiry. After some delay the sheriff interpleaded. It was held, on appeal from the County Court, that there was evidence to be submitted to the jury, and a nonsuit was properly refused. The cases are reviewed.

We fully agree in the law as there stated. It is impossible to regard the seizure at Orangeville of goods in the possession of plaintiff as not directed by defendant, and the latter, being fully informed of the facts by his book-keeper, fully assented to all that was done.

We think the nonsuit must be set aside without costs.

Rule absolute.

SNYDER v. SHIBLEY.

Arrears of taxes on non-resident lands—Levy after lands occupied and assessed as such—32 Vic. ch. 36, sec. 126, Ont.

Where lands, which had been assessed as non-resident, became occupied and assessed as such, *Held*, not competent for the treasurer, under sec. 126 of 32 Vic. ch. 36, Ont., to issue his warrant to levy arrears accrued when the lands were non-resident, the 111 to 117 sec. of the Act providing for that event.

TRESPASS and conversion of cattle, goods, and chattels of plaintiff.

Pleas, 1. Not guilty, per statute (C. S. U. C. ch. 126.)

2. That the chattels were not, nor was any or either of them plaintiff's, as alleged; and 3rd, a special plea of justification, that lot 16 in 14th concession of Portland in the County of Frontenac was patented by the Crown A.D. 1816, and thereafter subject to rates and assessments: that during the years from 1836 to 1859, both inclusive, said lot was duly charged, rated, and assessed according to law, and rates or taxes for each of such years were duly imposed thereon: that none of the said rates or taxes were ever paid: that the rates and taxes so imposed, and the increase and per centage on arrears added by the Treasurer, made a large sum, to wit, \$189.29: that during the years that the said lot was so rated and assessed, the same was unoccupied, and duly rated and assessed as unoccupied land of a non-resident: that the County Treasurers respectively, in each of said years, kept books of account, in which they duly enumerated and entered all the lands therein, including said lot number 16, and on which it appeared, from the returns duly made to them respectively, that there were any taxes unpaid, and the amount so due, and did duly balance said books, and did duly enter against every parcel of land, including said lot No. 16, the arrears due and unpaid, pursuant to the statutes: that the treasurers respectively duly added thereto the increase and per centage: that during 1869 Sidney William Davey was the collector of taxes for the Township of Portland, and that said taxes on

said lot No. 16, being in arrears to the amount of \$189.29, and the County Treasurer of the County of Frontenac, being satisfied that there was a distress upon said lot No. 16, on the 9th day of September, 1869, pursuant to the assessment Act of 1869, duly issued his warrant, under his hand and seal, to the said Sidney William Davy, Collector as aforesaid, authorizing and requiring him to distrain the goods and chattels which he should find upon said lot number sixteen for the said sum of \$189.29, so in arrear as aforesaid, and that in default of payment thereof, together with the cost of such distress, then that he should sell and dispose of such distress according to law for the recovery of said arrears of taxes and his proper costs and charges in such behalf; and the said collector, under and by virtue of said warrant, then and there, pursuant to the statute, seized and took said goods and chattels, and disposed thereof for a distress for arrears of taxes, as he lawfully might, for the cause aforesaid; and said defendant, then being Reeve of said Township of Portland, at the request of said collector, and as his assistant, did aid and assist said collector in said levy for such arrears of taxes, which were the grievances complained of.

Issue.

The case was tried before Wilson, J., when it was proved that in 1858 the west half of the lot was assessed to one Watson, who then occupied it: that during the years 1861, 2, 3, and 4 the plaintiff was assessed for, and as the occupant of the west half of the lot, and in 1861-2, one Nathaniel Guage, and in 1864 one Francis Shepherd, of the east half: that in 1865 the plaintiff was assessed for and as the occupant of the whole lot; in 1866, one Nelson Ashley of the West half and one Amos Switzer of the east half; in 1867 William Ashley of the west half and William Switzer of the east half; in 1868 and 1869 one Samuel Walden of the east half, Nelson Ashley of the east half of the west half, viz., 50 acres, and the plaintiff for the west quarter.

The learned Judge submitted several questions in writing to the jury, which they answered as follows: as to the 1st, they found that defendant did more

than tell the Treasurer there was a distress upon said lot—that he in fact procured the warrant to be issued and to be executed, and that he did so not for the purpose of the taxes ; as to the 2nd, they found that the defendant procured the warrant to be issued from spite against the plaintiff, and to strip plaintiff of his property, and not for the purpose of having the taxes raised ; as to the 3rd, that defendant did direct and interfere with the distress made and the disposal of the goods ; as to the 4th, that the horse, colt, and pig, were seized off the lot ; as to the 5th, that, in so far as the Treasurer was concerned, the warrant was issued for the purpose of levying the taxes, but that defendant's object in its being issued was not for that purpose ; as to the 6th, that there were no taxes imposed upon the lot from the year 1842 to 1854 ; as to the 7th, that the lot had been occupied from 1859 until that time ; as to the 8th, that there was no proof of the lot having been patented ; and as to the 9th, that at the time the warrant was given to Davy, on the 9th September, 1869, he was not legally collector of the township ; and they rendered a verdict for plaintiff, with \$300 damages.

The learned Judge reserved leave to defendant to move to enter a non-suit, and leave was reserved to both parties to raise any question of law which the evidence and case presented.

In Easter Term *Anderson* obtained a rule to set aside the verdict and enter a non-suit, pursuant to leave reserved, or for a new trial on the law, evidence, the weight of evidence, the Judge's charge, and for perverseness ; and for misdirection, in leaving to the jury, as a question of fact, a question of law, in the 6th question submitted to the jury ; and on the ground that the finding of the jury on the 9th question submitted to them, was a finding on the law and not on the facts.

Britton shewed cause, and cited *Addison Torts*, 601, 602 ; *Holcomb v. Shaw*, 22 U. C. pp. 101, 106.

Harrison, Q.C., and *Anderson*, contra, cited *Hall v. Hill*,

22 U. C. 578; *Kerns v. Phelan*, 19 C. P. 288; *Young v. Daniel*, 21 U. C. 443; *Dawkins v. Pawlet*, L. R. 5 Q. B. 94.

The statutes are referred to in the judgment of the court which was delivered by

GWYNNE, J.—The principle contention before us, upon the argument of the rule, upon the part of the defendant, was that he had, in fact, nothing whatever to do with the transaction further than conveying the treasurer's warrant to the collector Davy, and moreover that what was done was authorized by sec. 126 of 32 Vic. ch. 36, Ontario Statute, and that the defendant could not be liable in trespass for legal acts, however much he may have been influenced by malice towards the plaintiff.

As to the objection in the rule, that the finding of the jury, upon the 9th question submitted to them, was a finding on the law and not on the facts, that may be at once disposed of as immaterial, for the case can, as I think, be disposed of without being made to depend at all upon the point whether Davy was or not collector of the township, in fact or in law, when the warrant was given to him. It may be granted that he was.

The point taken of misdirection of the learned Judge, in submitting the 6th question to the jury, may also be disposed of at once.

That question, as submitted, was as follows: "Were the taxes from 1836 to 1859, inclusively, duly made against the lot? Second: If not, for which years were the taxes not imposed against the lot?"

The point of the objection to this question is that the word "duly" being inserted vitiates the question and makes it one of law and not of fact; but the second branch of the question shews that the word "duly" was not intended to have, and had not, any such effect as suggested, for the jury are told to say for which year, if any, taxes were not imposed, and that the jury were not misled is apparent from their answer, for they say that from 1842 to 1854 there were no taxes imposed. Neither did counsel for

the defendant, in so far as appears, see any objection in the question when it was submitted, which was the time to raise a point of misdirection, if there was any. There is nothing in this objection.

Then, as to the question of non-suit. It can not be questioned that there was evidence to go to the jury, who alone could pass upon the issues joined.

There is no room for the objection that the verdict is against the Judge's charge; so the rule must stand or fall upon the question whether the verdict should be set aside, and a new trial granted, upon the objection taken that the verdict is against law, evidence, and the weight of evidence.

Now, that there was evidence to warrant the jury in finding that the defendant was connected with the issuing of the warrant otherwise than as is now contended on his behalf, that he was the mere bearer of it from the treasurer to the collector, there is abundant evidence, nay, as it seems, to me there is conclusive evidence that the defendant was the original suggester and promoter of the issue of the warrant, and that in procuring it to issue he was, as found by the jury, influenced by spite and malice toward the plaintiff, and that his object was to strip him of his property, and not merely to have the taxes raised. The evidence, which justifies this conclusion, is not that of the plaintiff himself only and the witness Joiner. The fact of the defendant having been the promoter of the issuing of the warrant is, to my mind, sufficiently apparent from the evidence of the treasurer, the attorney, Snook, and the defendant himself, while the motive may be gathered from the evidence of Snook, the defendant himself, the plaintiff, and Mr. Joiner. My surprise would have been great if the jury had arrived at any other conclusion upon this point than they have. Shortly prior to the 9th of September, there had been two suits pending between the plaintiff and the defendant in respect of certain horses. These suits had just recently been determined in plaintiff's favour. Upon the 9th of September, the defendant, who is Warden of the County, and Reeve of the Township

of Portland, found himself in the office of Mr. Snook, who I understand to have been defendant's attorney as well as attorney of the County. Here the defendant opens a conversation with Mr. Snook relative to the suit with the plaintiff, in which he had so recently been defeated, and to the horses which had been the subject of the suit. Defendant says that he spoke to Snook of the suit and of the horses and told him that the plaintiff had sold out and was going away. Hereupon Snook asked about the lot, to which the defendant replied, that the plaintiff had sold his right for \$330. Snook said that was smart, and defendant said that plaintiff had only a possession, that the owner was not known. Thereupon Snook said he wondered if there were any back taxes due on it. Defendant says that at this time he did not know for certain that there were, but he knew that most of the lands in that neighbourhood were in arrear; accordingly, full of the idea, the conception of which is so attributed to Snook, they both go off to the treasurer's office. Snook looked at the treasurer's books, found there were arrears there entered, and turns round to defendant and interrogatively observes to him: "There is a distress on the lot?" To which defendant replied, "Yes," and Snook, in defendant's presence, tells the treasurer that the plaintiff is going away and that he should see after the arrears. This is the account of that day's transaction, as gathered from the evidence of the defendant himself, and Snook. The treasurer supplements it by saying, that he himself had no knowledge of the lot; that the defendant and Snook came to his office the day the warrant issued, and that no return had been made to him of there being a distress upon the lot. Defendant and Snook told him there was a distress on the lot, and that it was his duty to issue a warrant. *Defendant seemed urgent that the warrant should be issued.* He drew up the warrant, and, as he says, he thinks he gave it to the stage driver to carry out to Davy. Davy, however, says in his evidence that the defendant handed him the warrant and told him to take it, saying that it had been sent to

him, the defendant, by the treasurer of the county. Davy went to execute the warrant, and the night that he did so defendant went with him and slept in the room with him. The defendant admits that he went up twice to see the plaintiff, who has moved westward since the seizure, to endeavour to obtain a settlement with him.

Now, can any man doubt, upon this evidence, that the issuing of the warrant originated in the conversation between the defendant and Snook relative to the suit between the plaintiff and defendant, in which the former had been successful, and that they went to the treasurer's office for the express purpose of getting the warrant, and that Snook was put forward there in what he did by the defendant, and that the latter urged the treasurer to issue the warrant, and that the defendant himself, having absolute control over it, gave it to Davy to be executed. The evidence of the plaintiff was but the natural supplement of the above. The jury were, I think, quite justified in entertaining no doubt whatever, and in finding as they have found upon this point. The fact, then, of the defendant being connected with the issuing of the warrant and with its delivery to Davy for execution being so established beyond any doubt, the point remains whether he was or not justified in what he did as Warden of the County, and Reeve of the Township of Portland; for, if what was done was legal, the defendant cannot be liable in this action, however much his conduct may have originated in, and been influenced by, express malice towards the plaintiff.

The jury have found, and the evidence warrants the finding, that in fact the lot was not assessed, nor was any rate whatever imposed upon it in any of the years from 1842 to 1854, so that, in so far as taxes for those years were included in the warrant, that proceeding was illegal.

But it is contended that, if there were any taxes in arrear, the warrant will protect all parties justifying under it in an action of trespass. In the view which we take, the question does not turn upon this point; for, in our judgment, the treasurer had no jurisdiction to issue the warrant

at all under the circumstances appearing in the evidence, and therefore no persons can, in virtue of it, justify a trespass. The question turns upon the construction to be put upon 29 & 30 Vic., ch. 53, sec. 127, and 32 Vic., ch. 36, sec. 126 (Ont.), both sections of which Acts are identical in their terms with Consol. Stat. U. C., 22 Vic., ch. 55, sec. 122. It is there provided that, "whenever the county treasurer is satisfied that there is a distress upon any land of non-residents in arrear for taxes, he shall issue a warrant under his hand and seal to the collector of the local municipality, who shall thereby be authorized to levy the amount due *upon any goods and chattels found upon the land*, in the same manner and subject to the same provisions as are contained in the sections from sec. 97 to sec. 101 of 29 & 30 Vic., ch. 53, and in the sections from sec. 95 to sec. 101 of 32 Vic., ch. 36.

Now, it is clearly established by the evidence, and found by the jury, that lot 16 in the 14th concession of Portland has been continually occupied, and has been assessed as occupied land, and entered upon the assessment roll as such in each and every year from 1858 to 1869 inclusive. In none, therefore, of these years can this lot be regarded as the land of a non-resident within the meaning of the Act.

The Statute never intended that the county treasurer should, under the clauses of the Acts referred to, have power to levy arrears of taxes upon lands which have been for ten years occupied and assessed as such, if the owners of the land be not themselves the occupants. The Assessment Act draws a plain distinction between occupied lands, which are assessed on the assessment roll as such, and non-resident lands assessments. If the owner of land be non-resident, then, if the land is unoccupied, it shall be assessed in the name of and against the occupant and owner; *but if the land be not occupied* and the owner has not requested to be assessed therefor, then it shall be assessed as land of a non-resident, 29 & 30 Vic. ch. 53, sec. 25, and 32 Vic. ch. 36, sec. 25; so that, to be the

land of a non-resident, it] must be unoccupied, and therefore incapable of being assessed as occupied. Now special provision is made by these statutes for the case of land being assessed as occupied land after arrears have accrued on the non-resident roll. Thus, by sec. 111 of 29 & 30 Vic. ch. 53, the treasurer of every county *shall* furnish to the clerk of each municipality (except in cities and towns) in the county, a list of all lands in his municipality, in respect of which any taxes shall have been in arrear for three years preceding the 1st of January in each year, and by sec. 112 the clerk of every municipality in each county is required to keep the said list, so furnished by the county treasurer, on file in his office, subject to the inspection of any person requiring to see the same, *and he shall* also deliver to the assessor or assessors of the municipality each year, as soon as such assessors are appointed, a copy of such list, and it shall be the duty of the assessor to ascertain if any of the lots or parcels of land contained in such list are occupied, and to notify such occupants and the owners thereof, if known and resident in the municipality, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes, and enter, in a column reserved for that purpose, the words, "occupied land, parties notified," or "not occupied," as the case may be. All such lists shall be signed by the assessor and returned to the clerk with the assessment roll. Then, by section 114, the clerk of each municipality, on or before the 1st of May in each year, *shall* furnish to the county treasurer a list of such of the lands embraced in the list last received by him from the county treasurer as are entered upon the roll of the year as then occupied, and the county treasurer *shall*, on or before the 1st of July in the current year, return to the clerk of the municipality an account of all arrears of taxes due *in respect of such occupied lands*, including the per centage, and the clerk of the municipality *shall*, in making out the collector's roll, add such arrears of taxes to the taxes assessed against such occupied lands for the current year, and such arrears

shall be collected in the same manner, and subject to the same conditions, as all other taxes entered upon the collector's roll. Then, by the 115th section, if there shall not be sufficient distress upon any of the occupied lands in the preceding section named to satisfy the total amount charged against the same, as well for the arrears as for the taxes of the current year, the collector shall so return it in his roll to the treasurer of the municipality, shewing the amount collected, if any, and the amount remaining unpaid. Then, by the 116th section, the treasurer of each local municipality shall, on or before the 8th of April in each year, furnish the county treasurer with a statement of all arrears of taxes directed in said collector's roll to be collected, such return to contain a description of the lots or parcels of land, and a statement of unpaid arrears of taxes, if any, on lands of non-residents which have become occupied, as required by section 112. Then, by the 117th section, in case it shall be found by the statement, directed by the 116th section to be made to the county treasurer, that the arrears of taxes upon the occupied lands of non-residents, directed by the 115th section to be placed on the collector's roll, or any part thereof, remain in arrear, such lands shall be liable to be sold for such arrears, and shall be included in the next or any ensuing list of land to be sold by the county treasurer under the provisions of the 129th section of the Act, notwithstanding that the same may be occupied in the year when such sale takes place. The provisions contained in the 111th, 112th, 113th, and 114th sections of the above Act were first made in statute 27 Vic. ch. 19; those contained in sections 115, 116, and 117 were first enacted in 1866, and they are all re-enacted in 32 Vic. ch. 36.

Now, the Legislature having taken, as appears by these sections, so much pains to declare peremptorily what shall be done with respect to lands which, having fallen into arrears for taxes rated upon non-resident lands, have become occupied and assessed as such upon the assessment roll, and having given such precise directions as to the

mode in which arrears of taxes, accrued on lands before they became occupied, shall be levied when the lands shall have become occupied and assessed as such, it is impossible to conceive that the 126th section of 32 Vic., ch. 36, which is the same as sec. 127 of 29 & 30 Vic., ch. 53, and as sec. 122 of Consol. Stat. 22 Vic., ch. 55, was intended to apply, or can be applied, to the case of lands which, for ten consecutive years, have been removed altogether from the non-resident lands' roll, and placed on the assessment roll as being occupied lands, and assessed as such.

The Legislature, as it seems to me, by the 116th and 117th sections of 29 & 30 Vic., ch. 53, and 32 Vic., ch. 36, have drawn a plain and wide distinction, in the most express terms, between the words "lands of non-residents" simply and "the occupied lands of non-residents," or "lands of non-residents which have become occupied." Sec. 122 of 22 Vic., ch. 55, and sec. 127 of 29 & 30 Vic., ch. 53, and sec. 126 of 32 Vic., ch. 36, must, in my judgment, be construed as being confined to the case of lands which still continue on the non-resident roll, and are assessed as such at the time that the county treasurer issues the warrant by those sections authorized.

That this must be so will, as it seems to me, conclusively appear from a careful consideration of the sections from 111 to 117, which I have extracted from 29 & 30 Vic., ch. 53, and of secs. 127 of 29 & 30 Vic., and 126 of 32 Vic. By the latter sections, the distress is to be made on the lands of non-residents; that is, at the time of distress being made the Legislature contemplated that the land should be in the position described in the Assessment Acts as non-resident land; but if, at the time of distress levied, the land is occupied, and has been for ten years, and as such has been assessed for those ten years, it surely comes not within the description of land by the Assessment Acts termed non-resident.

The sections which I have extracted from 29 & 30 Vic., ch. 53, are imperative.

If the taxes upon this lot were in arrear, as alleged, it

became the duty of the treasurer to return the lot to the clerk of the township municipality under the 111th section. There is no evidence that this was not done, and I think we may fairly assume that, if the taxes were in arrear, it was done. It thereupon became the duty of the clerk, by the 112th section, to communicate with the assessor, in order that he should give notice to the occupant, with his assessment notice of the year, of the arrears of taxes on the lot. Then, by the 113th section, the assessor had to verify by oath the performance of his duty. Then, by the 114th section, it became the imperative duty of the clerk of the township to communicate to the county treasurer the fact of the lot being occupied and assessed as such, and thereupon it became the duty of the county treasurer to return to the clerk of the township an account of all arrears due upon the lot; and thereupon it became the duty of the township clerk to insert that amount, together with the assessed taxes of the year, upon the collector's roll; and thereupon it became the duty of the collector to levy the amount. If he levied the amount, or for so much as he did levy, he accounted to the township treasurer, and the lot never afterwards went back under the control of the county treasurer, unless or until the township treasurer should make a return to him of how much, if any, remained in arrear. Without such return the county treasurer could have no information as to whether anything remained in arrear, and upon the township treasurer returning that still something remained in arrear, then the 117th section provides that the lot shall be sold, and that notwithstanding that the lot may be occupied, and, by reason thereof, may have a distress upon it, in the year of the sale. Now, if the lot *shall be* sold notwithstanding such occupation, it could not have been intended that the county treasurer might nevertheless issue his warrant.

The conclusion to be drawn from these provisions of the Act, as it appears to me, clearly is, that the power of the county treasurer by warrant to levy is limited to non-

resident lands so long as they remain, as such, under his control, and that such control ceases as soon as, under the provisions of the 111th and subsequent sections, it becomes his duty to take the steps preliminary to the amount of arrears being placed upon the roll of the township collector, for the purpose of being collected by him under his roll out of the property of the occupant. It never could be intended that the county treasurer should retain the power to issue his warrant after the statute had transferred the duty of collecting to the township collector.

But whatever may be the construction to be put upon the clause of the Act authorizing the county treasurer to issue his warrant, the plaintiff in this case is, I think, entitled to retain his verdict. The jury have in effect found that the defendant in fact took part in, and directed and controlled, the actual levy and the sale; that he was the originator of and actor in the whole transaction, and that whatever Davy, the collector, did, he did by the defendant's express direction; that in truth the names of the county treasurer, the county attorney, the collector and the defendant's own characters of warden and reeve were so many cloaks used by him to cover his own private device and design to strip the plaintiff of his property. In a case of this nature I certainly feel no disposition to find fault with the finding of the jury. It may be said that their finding in this respect is arrived at by inferences drawn from the evidence rather than by direct evidence. There is some direct evidence, given by the plaintiff and Joiner, which I have no doubt that the jury believed, and I am not surprised, looking at the whole case, that they have believed it. Moreover, I cannot say that the inference is not fairly drawn from such parts of the evidence as may be said not to be direct. I do not think the finding of the jury should be disturbed, and the effect is that the defendant is responsible for all the acts of the constable, and so that he is liable for the seizure having been made without the notice required in the sections of 29 & 30 Vic. ch. 53, numbering from 97 to 101,

and in 32 Vic. ch. 31, from 95 to 101, and even for the sale of the cattle not seized on the lot.

It would indeed have been much to be regretted if any technical objection, arising out of the form of the action, should have compelled us to interfere with the verdict of the jury, which I take to be an undoubted expression of an honest indignation at a flagrant attempt by the defendant to commit a gross outrage under colour and pretence of the sanction of law.

Rule discharged.

GREEN V. HEWER ET AL.

Mortgagor and mortgagee—27 & 28 Vic., ch. 31—Application of insurance moneys received by mortgagee—Debt on bond—Pleading—Payment.

On 19th February, 1868, H. mortgaged certain land to one of defendants, to secure payment of \$2,400 as follows: \$500 in two years, and the balance in five years from that date, with interest in the meantime half-yearly. The mortgage was in the usual statutory form, and contained an insurance clause binding the mortgagor to insure the buildings on the land in at least \$1,500. Subsequently an insurance company granted to H. a policy of insurance in the sum of \$1,500 on the buildings, and \$500 on machinery therein. In the body of the policy the benefit of the insurance was secured to plaintiff (apparently in anticipation of his becoming the holder of the mortgage), thus: "Any claim for loss to be paid to Robert Green, of Guelph." Defendants afterwards assigned this mortgage to plaintiff, and both defendants entered into a bond to plaintiff, of same date, in a penalty of \$1,000, the condition of which, after reciting the assignment, and that the first instalment of \$500, under the mortgage, would fall due 19th February, 1870, provided that if H. should pay that instalment to plaintiff, when due, the bond should be void. H. then failed, and the instalment due 19th February, 1870, was not paid. The insured property was burned some months afterwards, and in January following plaintiff received, by virtue of the policy, the full amount of the insurance money (\$2,000), which was retained and applied by him to his own use. He then sued defendants on their bond.

The defendants set up the receipt and retention by the plaintiff of the insurance moneys, as amounting to a payment on account of the mortgage debt of a sum more than sufficient to satisfy the first instalment and interest, and contended that their bond was consequently discharged:

Held, no defence; for, 1st, the bond being forfeited by condition broken, the facts relied on could not be set up as a legal bar; and 2nd, either the insurance moneys received by the plaintiff (there being no stipulation as to their application) had not been legally applied, and could not be regarded as applied in *satisfaction* of any part of the mortgage debt; or, if capable of being so applied, they might be applied at the sole pleasure of the plaintiff in such a manner as to insure to him the full benefit of the defendant's bond as an effectual security for the payment of the first instalment, as mentioned in the condition.

THE declaration in this case was upon a bond, in a penal sum of \$1000, not setting forth the condition. The defendants pleaded that the bond was subject to a condition, whereby, after reciting that defendant John had assigned to plaintiff a certain indenture of mortgage, made by one Hemsteed to John, dated 19th February 1868, upon a certain piece of land, for securing \$2,400, and that the first instalment of \$500 on the said mortgage would fall due on the 19th day of February, 1870, the condition of the bond was declared to be, that if the said Hemsteed, his heirs or assigns, should pay that instalment to plaintiff, or his assigns, when due, then said bond should be void; and defendants averred that after the making of the bond, and before the 19th of February, 1870, Hemsteed, at the request of defendants, and for the purpose of protecting *them* against *their* liability as his sureties under the said bond, assigned to plaintiff, by way of collateral and for their security for the payment of said debt, a certain policy of insurance, whereby the British America Assurance Company insured Hemsteed against loss or damage by fire to *certain* property in said policy mentioned, to the amount of \$2,000, and *plaintiff accepted said policy for the purposes and on the terms aforesaid*; with a further averment that, while policy was in force, loss by fire happened to the insured property, by reason whereof the \$2000 became payable thereunder, and the same was then paid by the Company to plaintiff *with the consent* of Hemsteed and of defendants, and the plaintiff then, and with the like consent *accepted*, and *received*, and *retained* the said moneys, for and on account of, and in part payment and satisfaction of, said mortgage debt, and *thereby* and *therewith* the said moneys, being more than sufficient in that behalf, fully paid, satisfied, and discharged to the plaintiff the said sum of \$500, being the first instalment of said mortgage debt, and all interest thereon, and that all these things happened before commencement of action.

To this plea plaintiff replied that Hemsteed was bound by his mortgage to insure the buildings on the mortgaged

premises; that the insurance to the plea mentioned was upon the buildings, and that Hemsteed assigned the policy, and that plaintiff received the same and the insurance moneys not as security for, or in payment or satisfaction of, the said first instalment, in the condition of the bond mentioned, but as collateral security for, and as payment generally, on account of the mortgage debt of \$2,400, and the interest thereon, the whole of which debt and interest was due under the terms of the mortgage before and at the time of the receipt of said insurance moneys: and the said insurance moneys were received and applied by plaintiff in payment, in the first place, of that part of said mortgage debt and interest, which was not secured by defendants bond, and were not sufficient to extend to and pay said instalment in said condition mentioned, and the same instalment remained unpaid.

To this replication defendants rejoined.

1. That the mortgage debt and the interest thereon were conditioned to become due and payable as follows: \$500, part of the principal sum, being the instalment in the condition of defendants bond mentioned, at the expiration of two years, and the remainder of the principal at the expiration of five years from the date of said mortgage, and the interest at the rate of eight per cent. per annum, half yearly in the meantime on the 19th days of August and February in each year: averment, that neither at the time of the receipt by plaintiff of the insurance money, in part payment and satisfaction of the said mortgage debt and interest, nor at any other time, did Hemsteed or defendants, or either of them, ever direct, authorize, or assent to, the application by plaintiff of the said moneys in payment of the instalments of principal and interest under said mortgage, in any other order or manner of payment than that in which the plaintiff would be and was bound by law to apply a general payment of the amount so received by him, as paid in part payment and satisfaction of the said mortgage debt and interest.

2. That plaintiff did not apply the said insurance moneys

in payment, in the first place, of that part of said mortgage debt, and interest thereon, which was not secured by said bond.

To these rejoinders plaintiff demurred; to the first, upon the grounds that it did not deny that the whole of the mortgage moneys were payable at the time of the receipt of the insurance moneys, or that these moneys were received on account of the mortgage debt generally: that plaintiff was not bound to apply the insurance moneys in payment of any part of the mortgage debt, these moneys being his security in the place of the mortgaged premises which were burned; and that if it were intended by the said rejoinder that plaintiff had no right to hold the said moneys on account of the mortgage debt generally, whether that debt was payable or not, that the rejoinder was a departure from the plea.

As to the second rejoinder, that an immaterial issue was tendered, inasmuch as the first instalment being left unpaid, which the said rejoinder admitted, the plaintiff's action on the bond remained, even though plaintiff might have retained the insurance moneys as security, or disposed of them otherwise than in payment of the mortgage moneys.

The plaintiff also took issue upon the defendant's rejoinder, and the case went down to trial before Hagarty, C. J., at the last Assizes at Guelph.

The facts appeared to be, as collected from the evidence adduced at the trial, that the mortgage executed by Hemsted to John Hewer, dated the 19th day of February, was executed in pursuance of the Act respecting Short Forms of Mortgages, and contained a covenant by Hemsted to insure the buildings on the said lands to the amount of not less than \$1,500.

The policy of insurance, which was effected by Hemsted in pursuance of his covenant with John Hewer, was produced, and it appeared to have been effected upon the 5th May, 1868, in pursuance of an application dated 13th April, 1868, in the sum of \$1,500 on buildings and \$500 on machinery therein, in all \$2,000.

According to the evidence of John Hewer, it appeared that he and Hemstead, being together interested in the premises in question, in what proportion was not clearly explained, and Hewer being indebted to the plaintiff in the sum of about \$1,500, proposed to the plaintiff to assign to him the mortgage, if he would advance him the difference, or \$900. John Hewer said that he told the plaintiff of the insurance, and how it was divided, namely, \$1,500 on the buildings and \$500 on the machinery, till the first instalment of the mortgage should be paid; and also that he told the plaintiff that he was sure the first instalment would be paid, for that Hemstead was working for him, Hewer, who appeared to have been the person who worked the tannery on the mortgaged premises; that plaintiff said that if Hewer would give him security for the first instalment he would be satisfied: that he required security that the first instalment should be paid.

Hemstead, the mortgagor, was called. He said that he and Hewer, jointly, bought the machinery, which was put into the mortgaged premises, which were used as a tannery; that he put up the buildings, but that Hewer was to find money at eight per cent.; that he told Hemstead that he owed the plaintiff about \$2,000, and that he wanted to give the mortgage to plaintiff. He said he was to give the bond of himself and his father as security to plaintiff, provided he, Hemstead, should not meet the first payment. Hewer then asked Hemstead to execute the mortgage to him, as he could not then pay plaintiff what he owed, and he said he was to give the bond besides as security for the first instalment. That instalment, Hemstead says, he never paid, and that he failed and made an assignment in August, 1869, and that from June, in that year, Hewer alone worked the tannery, until October, 1870, when the buildings were burned, and Hemstead said that he never consented to plaintiff applying the insurance money in payment of the mortgage.

A verdict was rendered for the plaintiff, with leave to defendants to move to enter it for defendants, or a nonsuit,

the Court to amend the pleadings, if necessary, to meet the facts proved.

C. S. Patterson appeared to shew cause to the rule, and in support of the demurrers. He contended, 1st, that the receipt and retention of the insurance money by plaintiff did not constitute a payment of any portion of the mortgage debt, but that he was entitled to hold it in lieu of the original security: and, 2ndly, that, even assuming it to constitute payment *pro tanto*, the plaintiff had a right to appropriate it in such a manner as to preserve to him the benefit of the collateral obligation of the defendants. He cited *Austin v. Story*, 10 Grant 306; *Plomer v. Long*, 1 Stark 153; *Wright v. Hickling*, 2 C. P. 199; *Simson v. Ingham*, 2 B. & C. 65.

Palmer, contra. The first point is not open to the plaintiff, if written pleadings are still of any use. Here it is asserted in the plea, and repeated in the replication, that the money was applied in part payment and satisfaction of the mortgage debt. The contention, as plainly appears from the pleadings, is not as to the application of the money, but as to its appropriation. This was also abundantly shown by the evidence at the trial, where the plaintiff himself stated that only a balance of \$400 remained due to him. The plaintiff cannot now contradict the record. Apart from the pleadings, when the plaintiff put the insurance money in his pocket and used it, he lost the opportunity of contending that he had a right to have it stand in place of the original security: whether the receipt of the money by the plaintiff was payment or not, the plaintiff made it so. Then, as to the second point, the mode of appropriation contended for is equally unheard of at law or in equity. A general payment upon a mortgage is applied first to meet the interest, then in discharge of the principal in order of maturity. If an account were now taken in equity of what is due on this mortgage, a rest would be made: *Thompson v. Hudson*, L. R. 10 Eq. 497. The doctrine as to appropriation of payments does not

arise where there are not distinct debts, nor where the defendants had not the power of exercising the option: *Chitty* on Contracts, 8th ed. 683, 686; nor can such an appropriation as is attempted here be made against a surety. The plaintiff is attempting to convert a surety for a single instalment into a surety for the entire debt. The facts of this case furnish a perfectly good special plea of payment. The plaintiff, with the money in his pocket, could not successfully have sued Hemsteed for this instalment; how, then, can he sue the defendants, his sureties?

GWYNNE, J., delivered the judgment of the Court.

I must confess that in my judgment the tendency of the rejoinders is not to lead to that perfection of pleading—a single, certain, and material issue. As to the first rejoinder, instead of assisting in reducing the issue between the parties to some material matter of fact, it seems to me to be in effect a re-affirmation simply of the construction of law which the defendants in their plea contend should be put upon the fact of the receipt by the plaintiff of the insurance moneys, and it appears to me that an equally good issue in fact, if any material issue in fact could be joined on these pleadings, would have been obtained by a joinder in issue on the plea, as by a joinder in issue on the rejoinder.

The gist and the substance of the plea I take to be that the defendants allege that *after they* had incurred the obligation contained in the bond they, for *their* protection against that liability, as sureties of Hemsteed, procured Hemsteed to assign to the plaintiff a policy of insurance on certain property, not stating what property, against loss and damage by fire to the amount of \$2,000, and that the plaintiff accepted the policy upon those terms, (that is, plainly upon the terms that it should avail as a security to the defendants as a protection against their liability on their bond); that the plaintiff received the insurance money of \$2,000, with the consent of Hemsteed and of the defendants, and with the like consent retained the same

in part payment and satisfaction of the mortgage debt; whereby (that is, in virtue of such receipt of such insurance moneys under the circumstances pleaded) the defendants, as a conclusion of law to be deduced from the premises, contend that the \$500, the first instalment in the condition of their bond mentioned, has been fully paid and satisfied. The plea, I presume, is intended as a constructive plea of payment, but whether as a constructive plea of payment *ad diem* or *post diem* does not appear, for it is not stated whether the insurance moneys were received by the plaintiff before or after the bond became forfeited, that is, before or after the day upon which the first instalment of the mortgage debt was payable. Now assuming, for the sake of argument, the plea to be an appropriate and good plea to an action on a bond guaranteeing the payment by another of a sum certain at a day certain, the question whether the legal deduction insisted upon as following upon the facts pleaded is established or not, must depend upon the question whether the facts pleaded, as leading to the legal conclusion, are true or false: a good replication to such a plea would address itself to displacing the facts alleged and denying their truth. Accordingly the plaintiff, in his replication, in substance alleges that, so far from the plaintiff having become interested in the policy in the manner and under the circumstances stated by the defendants in their plea, Hemsted was bound by his mortgage to John Hewer to insure the buildings on the mortgaged premises; that the policy of insurance in the plea mentioned was a policy effected by Hemsted on the buildings, and that Hemsted assigned the policy to the plaintiff, and the plaintiff received it and the insurance moneys paid thereon as collateral security to the mortgage debt, the whole of which was due and payable when he received the insurance moneys, and not security for or in payment or satisfaction of the said instalment in the condition mentioned; and the replication adds that the plaintiff applied the insurance moneys in satisfaction of that portion of the mortgage debt which was not secured by the defendant's

bond, holding their bond as security for that instalment. Now this latter averment is wholly immaterial, in so far as the replication is in displacement of the truth of the allegations contained in the plea from which the conclusion in law therein insisted upon is drawn; but if the substance of the other matter be true, then it is not true, as alleged in the plea, that the plaintiff held the policy in the manner and under the circumstances set out in the plea, upon the terms that the insurance moneys should be applied for the protection of the defendants against the liability incurred by the bond. Now, the defendants, passing by these matters alleged by the plaintiff in his replication, in denial of the allegations contained in the plea, aver in their first rejoinder in substance, and apparently in answer to the last averment in the plaintiff's replication, as to his mode of application of the insurance moneys, that neither Hemsted nor the defendants, nor either of them, ever directed, authorized, or assented to, the application of the insurance moneys by the plaintiff in any other manner than that in which he was by law bound to apply them; and in the second rejoinder the defendants merely deny the averment, at the end of the replication, of the manner in which the plaintiff alleges that he applied, as he insists he had the right to apply, the insurance moneys. This mode of pleading appears to me wholly illusory and defective.

As a legal plea, however, the plea out of which these demurrers arise offers no defence to the plaintiff's action. If the bond be forfeited by condition broken, we know no authority which justifies the setting up of the matters here alleged as a legal bar. Mr. Palmer, to meet this objection, asked that the pleadings might be amended, by inserting therein that the matters relied on were set up by way of defence upon equitable grounds. But before we should do that, we must see what the equity of the case really is upon consideration of the facts elicited at the trial, and, moreover, there can be no object in so amending the pleadings for the mere purpose of judgment upon the demurrer, for, by the leave reserved at the trial,

the Court may amend the pleadings so as to conform to the facts. The plaintiff has filed two replications besides that to which the rejoinders demurred to are pleaded, denying the material allegations in the defendants' plea.

If the real facts, as established by the evidence, should appear to be different from those set out in the plea, there would be no reason in allowing the defendants to convert their present legal plea into one pleaded by way of defence upon equitable grounds, and the leave reserved at the trial will enable us to allow an amendment, by setting up the facts as established by the evidence, and we may allow *them* to be pleaded, by way of defence upon equitable grounds, if we shall be of opinion clearly that they offer a good equitable defence, upon such terms as to payment of the cost of the demurrers as we may think reasonable.

Now, as to the rule *nisi*.

The short covenant contained in the mortgage from Hemsted to Hewer is, by the Stat. 27 and 28 Vic. ch. 31, sec. 12, declared to be to the effect, "that the mortgagor shall during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the mortgagee, his heirs or assigns, the messuages and buildings erected on the said lands, in the sum of \$1,500 at the least, in some insurance office to be approved of by the mortgagee, his heirs or assigns, and pay all premiums, &c., and will *on demand* assign, transfer, and deliver unto the said mortgagee, his heirs, executors, administrators, or assigns, the policy or policies of insurance, receipt or receipts thereto appertaining." The covenant does not extend to providing what shall be done with the insurance money in case of loss or damage by fire occurring.

An assignee of the mortgage would be entitled, as such, to the benefit of the above covenant. If the insurance covenanted to be effected, was effected by the mortgagor prior to the assignment, he would be entitled to demand and have an assignment of the policy perfected to himself, and if no policy had yet been effected, he was entitled to demand and have one effected and perfectly assigned to

him, so that he should hold it and the benefit thereof as *incidental* to the *mortgage*. Upon the assignment being perfected he would become entitled to receive the insurance money, becoming payable upon a loss occurring, into his own hands, whatever application they might, according to the rules of law and equity, be liable to, upon being so received: no further consent, either of mortgagor or mortgagee, beyond that contained in the covenant in the mortgage, the fact of the assignment thereof and of the policy itself to the assignee, would be required to enable the assignee to receive all monies payable under the policy.

In *Garden v. Ingram*, before V. C. Knight Bruce, and in appeal before Lord Chancellor Lord St. Leonards, 23 L. J. Ch. 478, where a lessee had covenanted with his lessor to insure the leasehold premises against fire, in the joint names of the lessor and himself, with a proviso that the policy moneys should be expended in reinstating the premises, and an assurance was effected accordingly, and afterwards the defendant assigned the lease by way of mortgage, with a power of sale, under which the mortgagee sold, damage by fire having occurred, in respect of which £190 was payable under the policy, on a claim filed by the mortgagee and his vendee against the mortgagor and his lessor, the mortgagor was decreed to deliver up and join with the lessor in signing the receipt to the insurance office, to enable the mortgagee to receive the money payable under the policy; and the mortgagee having already reinstated the premises, it was held that the lessee mortgagor was not entitled, as against his mortgagee, to a lien on the policy moneys for repairs done by the mortgagor himself after the fire, although the mortgage deed did not notice or refer to the policy.

In *Lees v. Whiteley*, L. Rp. 2, Eq. 143, where the defendants had assigned certain machinery in a cotton mill by a bill of sale, to secure a sum of money advanced by the plaintiff to buy the machinery, the deed contained a covenant by the defendants to insure, but no provision for the application of the policy moneys in case of fire, in liquidation of

the mortgage debt or otherwise ; the machinery was burnt and the defendants became bankrupts, and it was held that the plaintiff had no claim to the benefit of the policy. Kindersley, V. C., there says, that at first sight it would seem consistent with natural justice that the plaintiff should have the right claimed, and that the question naturally occurs why the covenant to insure should have been required of the plaintiff if it was not intended that he should have the benefit of the insurance. He distinguishes the case from *Garden v. Ingram* thus ; but the present is not the case of mortgage of premises on which there was a policy existing at the time of the mortgage, nor is there here a covenant that the policy money shall be applied in restoring the premises, but it is merely an assignment, by bill of sale, of machinery, containing a covenant to insure. "It appears to me," he says, "that if the plaintiff's construction can be sustained, it must stand on the footing that, by reason of the covenant to insure, there is an implied covenant with the mortgagee that the policy moneys should be applied in liquidation of the mortgage debt ;" and he came to the conclusion that he could not imply such a covenant ; that by so doing he should be making a new contract between the parties ; that it was competent for the plaintiff to have stipulated that the policy moneys should be applied in liquidation of the mortgage debt, or in restoration of the premises, but that he had not done so, and that he, the Vice Chancellor, could not make for the plaintiff a better agreement than he had thought necessary to make for himself.

The policy upon its face, it is true, shews that it is for an amount, viz., \$500, in excess of what the covenant called for, and upon machinery in the mortgaged buildings, not the buildings themselves ; but this is the policy which was in existence as representing the policy referred to in the covenant at the time of the assignment of the mortgage by John Hewer to the plaintiff, which, although not produced, was said to bear date the same day as the defendants' bond, which bears date the 3rd day of June, 1868. The mode in which the benefit of this policy was purported to

be secured to the plaintiff is, that in the policy itself are inserted the words, "Any claim for loss to be paid to Robert Green, of Guelph." These words, being so inserted in the policy, which bears date about a month before the assignment of the mortgage, would seem to shew that the policy was effected for the express purpose of having the benefit thereof secured to the plaintiff as part of the transaction, and preliminary to the assignment of the mortgage to him. What is the precise effect of these words in a policy does not seem yet to be clearly determined. We have held in this Court, in *McCollum v. The Aetna Insurance Co.*, that, in a marine policy, similar words did not make the party to whom the loss, if any, may so be paid, to be the party insured by the policy, so as to enable him to sue in his own name on the policy; but, whatever may be the full effect of the words, they must at least amount to notice given by the insured to the Company *that they may pay* the person so indicated, and that license could never be retracted if, as here, the person so named was entitled to the benefit of a covenant of the insured to insure and keep insured, and to assign the policy to the person named as authorized to receive the insurance money. Looking at the instruments alone, then, it would seem to be sufficiently clear that the plaintiff was entitled to receive the insurance moneys to the amount of \$2,000, as collateral security for the moneys secured by the mortgage, and as incidental to the mortgage and the assignment thereof, irrespective of any other security transferred to the plaintiff as a guarantee for the payment of the mortgage debt, or any part thereof.

Now, upon this evidence, it is to be observed that, if in truth the arrangement was that Hewer's interest in the policy of insurance to the extent of \$500 on the machinery, which, although said to be Hewer's sole property, was insured in Hemstead's name, was to be the plaintiff's security for the payment of the first instalment, there would have been no occasion for the bonds executed by James and John Hewer. Moreover, such a security would

afford no guarantee whatever, unless in the event of the machinery being destroyed by fire before the first instalment should fall due, which could hardly have been what was in contemplation of the parties.

The plaintiff was also examined. He says that he took the policy of insurance for \$2,000 as collateral security to the mortgage, and that he required besides additional security that the first instalment should be paid, and that for this he took the bond; that he knew no difference between the \$1,500 on the buildings and the \$500 on the machinery; that he knew it had been bought on the joint liability of Hemstead and Hewer; but that he never heard anything about any difference between the two subjects of insurance until after the fire; that he, the plaintiff, was to have the policy for the \$2,000, *and also* the bond, which latter was to be specially to secure the due payment of the first instalment.

The plaintiff appears to have received the insurance money from the company in virtue of his right as assignee of the mortgage, and of the notice conveyed to the company, and embodied in the policy, that any claim for loss was to be paid to him, and not in consequence of any other assent of Hemstead or Hewer.

Now, upon this evidence, the conclusion, as to what the facts are, at which, I think, we must arrive is, that the statement of the plaintiff, as most natural and consistent with what the documents shew, is to be relied upon in preference to that of the defendant John Hewer; indeed, looking at the equities of the case, there seems to be strong reason for believing that the mortgage was executed in some manner for Hewer's convenience, and to enable him to raise money from the plaintiff to carry on a business in which Hewer and Helmstead were, upon some arrangement, mutually interested; but however this may be, I think we must take the established facts to be, that the plaintiff consented to take the assignment of the mortgage wholly upon the terms that he should have the policy of insurance for the \$2,000, taking it as *the* policy effected by

the mortgagor in pursuance of his covenant in that behalf, and that, besides, the plaintiff should have the additional special security of the bond to guarantee the first instalment of the mortgage money made payable the 19th February, 1870; that this instalment was not paid when it became due, and that at the time it became due Helmsteed, the mortgagor, was insolvent; that after the fire, which took place in October, 1870, the plaintiff, in virtue solely of his right as assignee of the mortgage and of the direc-

ERRATA.

At page 369, in lieu of "Harrison, Q. C., obtained," read *F. Osler*, obtained; in lieu of "to which McMahon shewed cause," read *which McMahon* (of London) *supported*; and in lieu of "Harrison, Q. C., contra," read *Harrison, Q. C., shewed cause*. At the conclusion of the report, in the award of judgment, in lieu of "defendant," read *plaintiff* for \$162.

ment, discharged the defendants in equity, for that it must be applied in payment of the first instalment of the mortgage; and he contended that the plaintiff could not proceed against Helmsteed to recover the first instalment, and that therefore he could not against his sureties; and reference was made to the 16th section of the Act 27 & 28 Vic. ch. 31, in support of this argument, whereby, although it is provided that, on default of payment of interest, the principal money secured by the mortgage shall become payable, it is also enacted that the mortgagor, his heirs or assigns, shall, on payment of all arrears with costs, at

any time before any judgment at law, or within such time as by the practice of equity relief therein could be obtained, be relieved from the consequences of non-payment of so much of the money secured by the mortgage as may not then have become payable by reason of lapse of time; and it is contended that the receipt of the insurance by the plaintiff constitutes a payment within that clause. But herein, as it seems to me, is involved a manifest fallacy, for the payment by the insurance company of the insurance moneys payable under the policy to the assignee of the mortgage, who is also assignee of the policy, can in no sense be said to be a payment by the mortgagor within that clause of the Act, in the absence of any contract existing between the plaintiff and the mortgagor as to the application of the insurance moneys when received by him, and the evidence of the mortgagor is, that he never consented to any application thereof in payment of the mortgage debt. *Austin v. Story* (10 Grant 306) is, I apprehend, a clear authority that there is no equity which enables or compels the assignee of the mortgagee so to apply the insurance money without an express stipulation.

The case, then, appears to resolve itself into this, that either the insurance moneys received by the plaintiff (there being no stipulation as to their application) have not been legally applied, and therefore cannot be regarded as applied in *satisfaction* of any part of the mortgage debt, or, if capable of being so applied, they may be so applied at the sole pleasure of the plaintiff in such a manner as to insure to him the full benefit of his original contract, namely, that he should have the defendant's bond as an effectual security for the payment of the first instalment mentioned in the condition thereof.

Upon the whole, therefore, it appears to me clear that, upon the pleadings as they stand, the plaintiff should have judgment both on the demurrers and the rule, and as I can see no equity, but rather the reverse, viewing the facts of the case as I do, in the claim of the defendants to be held discharged from their obligation, there is no object to be served in authorizing any amendment in the pleadings.

The defendants can, to the full extent of what appears to me to be their right, protect themselves by paying their bond, and taking measures, as sureties of the mortgagor, to obtain for themselves indemnity for their advance, by the transfer to them of the mortgage security *pro tanto*.

HAGARTY, C. J.—If our decision were different from that just announced by my brother Gwynne, I think it would have created an effect exactly opposite to what the parties supposed when the contract was entered into, and it is always unfortunate when such a result occurs.

A man advances money on a proposed security, to be repaid to him by instalments. He takes a mortgage, with an agreement that the premises shall be kept insured. As an additional security he requires a bond from a third party, securing the payment of the first instalment of \$500. The payment of this sum would at once turn a doubtful into an undoubted security, the debt being \$2,400, the insurance \$2,000. The day appointed for payment of the instalment arrives, the bond is forfeited, and a complete cause of action accrued thereon. By the terms of the policy the loss was payable directly to plaintiff. Long before the first instalment fell due mortgagor became insolvent, and left the premises, and from thence down to the fire, which was in October, 1870, the obligor of the bond occupied the premises as a tannery. Then came the fire, and plaintiff, the mortgagee, received the \$2,000 insurance money, not from or under any fresh bargain with mortgagor, but under the original bargain.

It is difficult to see how this can be considered a payment *post diem* of the bond by mortgagor under the condition.

GALT, J., concurred.

*Judgment for plaintiff on demurrer, and
rule discharged.*

ROSS V. THE CORPORATION OF BRUCE.

Arbitration—Omission to state questions of law for the Court—Award set aside.

Where, on a submission to arbitration of a cause and all matters in difference therein, *subject to such points of law as should properly arise on the pleadings and evidence*, a question arose as to the sufficiency, to bind one of the parties, of certain evidence tendered respecting some extra work done outside of the sealed contract, entered into between the parties, and the arbitrators, instead of reserving this for the opinion of the Court, themselves decided that the evidence was quite sufficient, merely reporting what the legal objection was, the Court, with very strong observations on the flagrant disregard of their plain duty under the submission, refused to refer the matter back to the arbitrators, but simply set aside their award and the verdict found by them in favor of the plaintiff.

Robinson, Q.C., obtained a rule calling upon the plaintiff to shew cause why the verdict entered in this cause and the award made between the parties should not be set aside, on various grounds stated in the rule, two of which only it is material to mention: 1st, That the arbitrators had not stated in their award, as requested by the defendants, and as required by the rule of reference and submission, the legal points raised and submitted by defendants, so as to enable the Court to determine the same, and the effect of such determination on the award; 2nd, That the arbitrators had not, as required by the said submission, and requested by defendants, stated the facts and evidence bearing upon such legal points, so as to enable the Court to determine the same.

By the papers and affidavits filed it appeared that an action was brought by plaintiff against defendants, claiming that defendants were indebted to plaintiff in a large sum of money, the declaration containing only the common counts. To this the defendants pleaded never indebted, payment, set-off, and a special plea setting forth that plaintiff was, under the terms of an agreement with defendants, bound to finish certain works therein mentioned within certain time therein stated, under certain penalties therein set forth, and that plaintiff did not finish the said works within the said time, and consequently was indebted to defendants in a large sum of money.

To this last plea there were several replications, but, as the matter of the plea was abandoned before the arbitrators, it is unnecessary now to refer to them.

The case went down for trial, before Morrison, J., at the Spring Assizes of 1870, for the County of Middlesex, when, by order of the Court, by and with the consent of the parties, their counsel and attorneys, a verdict was entered for plaintiff for \$50,000, subject to be reduced or increased, or a verdict entered for the defendants, by the award of certain parties therein named, to whom the said cause and all matters in difference therein were referred. The submission was in the usual form, but contained the following express provision: "And this reference is made subject to such points of law as will properly arise on the pleadings and evidence." This submission was made a rule of this Court in Hilary Term last. In the preceding Michaelmas Term, *Robinson*, Q.C., applied for leave to revoke the power and authority of the arbitrators, on the ground that they had received evidence and entertained and gone into matters and claims not within the reference or their jurisdiction thereunder, and were proceeding to determine in the cause matters not referred to them. This application, and the judgment of the Court thereon, are reported in 21 C. P., p. 41.

After the judgment there delivered the arbitrators proceeded with the reference, and on the 3rd day of February, 1871, made an award, which was signed by two of them. The portions of the award material for the determination of this application were as follow: "And we further award and adjudge that the plaintiff has sustained damages, by reason of the non-performance by the defendants of the provisions in the declaration mentioned, to the amount of thirteen thousand nine hundred and sixty-six dollars and ninety cents, which sum we award and direct the defendants to pay to the plaintiff. And the defendants, by their counsel, having raised certain points of law before us, we have annexed hereto a statement of such points of law in detail; and the defendants having, by their counsel afore-

said, required us to distinguish in our award the subjects on which we have awarded money to the plaintiff, we certify and declare that we have awarded to the plaintiff the sums following, in respect of the several items following, which are mentioned in the plaintiff's particulars attached to the record, as follows: In respect to item No. 80, \$8,949.20." Here followed a number of items amounting in the whole to \$13,966.90. The award then proceeded: "And with respect to the said items, we find that the plaintiff, under a certain written contract, made between him and the United Counties of Huron and Bruce, bearing date the second day of March, 1866, performed certain work for the said United Counties upon sections three and four of the Bruce Gravel Road, for which the plaintiff claimed to recover in the said action; but we find and certify that the plaintiff has no claim against the defendants in respect of the said work so done under the said written contract, and that we have made no allowance to the plaintiff in respect thereof; but we declare and certify that the work, for which we have found in favor of the plaintiff, and which forms the several items aforesaid, was work and labor done and performed by the plaintiff for the defendants at their request, not under the said written contract, or as an extra to it, but upon separate bargains and contracts made by the plaintiff with the defendants, wholly unconnected with the said written contract and independent thereof. We further find that it was not a part of such bargains and contracts that the defendants should be liable only upon the estimates of their engineer in charge of the work." Annexed to the award was a statement of the points of law in detail, as stated in the award. These were very particular and exact, the third being the only one material to notice, and being as follows: "As to all and each separately of the said items, the defendants object and submit that there is no evidence of any authority of the engineer mentioned in the said contract under seal (by whom all the work claimed for is alleged to have been ordered and superintended) to bind

them by any order or contract for work done on the line of road contracted for by the said contract, namely, sections 3 & 4: being of the kind and description of work mentioned in and agreed to be done under said contract, they can be liable only by virtue of an express contract wholly separate from, and independent of, the said contract under seal, of which express contract there is no evidence."

Among the documents, filed by defendants on this application, was the contract of 2nd March, 1866, which was produced and proved before the arbitrators, and on which defendants relied as their defence before the arbitrators. By the contract plaintiff agreed with the corporation of the United Counties of Huron and Bruce "to construct and finish, in every respect in the most substantial and workmanlike manner, in strict accordance with the specifications, letter 'A,' annexed thereto, and with the plans and profiles in possession of the engineer of the corporation in charge of the works thereafter mentioned, and with the tender and schedules thereto annexed, and to the entire satisfaction of the said engineer in charge, those portions of the gravel road of the County of Bruce known in the schedules of sections hereto annexed, lettered 'B,' as sections numbers three and four, &c., &c.; and further, it is distinctly understood and agreed that in no case will extra haul be allowed for gravel, and no extras of any kind allowed for, unless authorized and directed in writing by the engineer in charge." By the tender annexed to the contract, the plaintiff agreed to perform all extra work, over and above the engineer's estimates, at certain rates specified in said tender.

There were affidavits from the three arbitrators filed on this application. Thomas Gibson, the arbitrator appointed by the defendants, swore (sec. 3): "That I declined to sign the said award, believing it to be exorbitant and unjust in the extreme, and believing also that the said award finds and states, as facts, matters of which there was no evidence whatever before the arbitrators, namely, that the work, for which the said award finds in favor of the plaintiff, was

done by the plaintiff for the defendants, at their request, upon bargains and contracts, made by the said plaintiff with the defendants, separate from, and wholly independent of, the contract in writing, and under and between the said plaintiff and the corporation of the United Counties of Huron and Bruce, and that it was no part of such contracts that the defendants should be liable only upon the estimates of their engineer in charge of the work."

This affidavit was answered, as follows, by the other two arbitrators (sec. 7 of Whitehead's affidavit, and sec. 8 of Holmes's): "That it is not true, as alleged on the belief of the said Thomas Gibson in the third paragraph of the said affidavit (here followed a copy of the above section); on the contrary, I say that there is abundant evidence, as will be manifest by a perusal thereof, to establish beyond doubt that the said work awarded for was not done under or in pursuance of the said written contract, or extras thereupon, but wholly independent and apart therefrom, and never contemplated, when the said written contract was entered into, but that the said work awarded for was done and performed by the plaintiff for the defendants upon separate bargains and contracts, as in the said award alleged, and that the said bargains and contracts were made at different times, and some of them at different places, as in the case of the Riversdale Bridge, allowed for in making up the said award; and there is no evidence whatever that the defendants were to be liable only upon the said separate bargains and contracts upon the estimate of the engineer in charge of the work; on the contrary, as is shewn even by the evidence for the defence, the said engineer had a wide discretion in having work done for the defendants quite outside and independent of the said written contract, and for such work it never was intended that payment should be made on the engineer's estimates only."

The affidavits made by each of the three arbitrators were very lengthy, and in direct contradiction; that is, the two who signed the award contradicted the allegations made by the dissentient.

The affidavit of Gibson, the warden of the County of Bruce, after stating his official connection with the Gravel Roads Committee, at the time when the contract of 2nd March, 1866, was entered into, stated: "That plaintiff, on the second day of March, 1866, entered into a contract under seal with the then United Counties of Huron and Bruce to construct and finish, in every respect in accordance with the specifications annexed to said contract, sections numbers three and four of the gravel roads of said County of Bruce, which said contract was proved and put in evidence before the arbitrators in this cause; that, except as regards certain repairs ordered and done in the year A.D. 1868, on said section three and section fourteen of said gravel roads, the defendants never made, or were asked by the plaintiff to make, with the said plaintiff, any other contract for any work to be done upon said sections three and four, than in said contract under seal; that the said contract under seal was never in any way abandoned, rescinded, or put an end to by the defendants, nor were they ever asked by said plaintiff to abandon, rescind, or put an end to it." This deponent stated that he was examined as a witness before the arbitrators, and that his evidence was in substance as stated in his affidavit.

Plaintiff also made an affidavit, in which he contradicted the statement made in the third paragraph of Gibson's affidavit, that the award was exorbitant and unjust. He then stated (paragraph four): "That the whole amount of the work and labour allowed for by the said arbitrators, in making up their award, was done by me for the defendants upon bargains and contracts" (not stating what they were, or when or by whom made), "which said work and labour was received, used, and enjoyed by the said defendants, but no sum of money whatever has ever been paid to me by them as compensation or satisfaction for the said work and labour done as aforesaid upon the said bargains and contracts." Par. 6: "That as to the said written contract under seal, all the work called for by it was done

and performed by me quite independent of, and distinct from, the bargains and contracts" (not stating what they were) "upon which the work was done and performed, now claimed by me in this action, and upon which the said award was founded."

The item No. 80, in the particulars of plaintiff's claim, and for which the arbitrators, as appeared by their award, as stated, had allowed the sum of \$8,949.20, was: "Total extra fill in sections Nos. 3 and 4, 48,066 cubic yards, at 20 cents, \$9,613.20."

M. C. Cameron, Q. C., and *Glass* shewed cause, contending that the submission did not compel the arbitrators to raise points of law, and that the previous judgment of the Court was wrong in this respect; but that, if it did, the arbitrators must have found the facts, and they had done so (citing *Russell* on Awards, 302.) They further argued that error would lie from a special case, but it did not follow that it would lie in such a case as this (*Russell*, *supra*). They referred also to *Gumm v. Fowler*, 2 E. & E. 890; *Baggalay v. Borthwick*, 10 C. B. N. S., 61; *Gibbon v. Parker*, 5 L. T. N. S. 584; *Jephson v. Howkins*, 2 M. & G. 366. As to the affidavits, they contended that the Court would not interfere with an award on its merits, and they cited the following cases: *Slack v. McEathron*, 3 U. C. R. 184; *Scobell v. Gillmour*, 5 U. C. R. 48; *Wells v. Gzowski*, 16 U. C. R. 42.

C. Robinson, Q. C., contra, cited *Ritchie v. Bank of Montreal* 4 U. C. R. 459; *Watson v. O'Beirne*, 7 U. C. R. 345; *Cowan v. God. N. G. R. Co.*, 5 H. L. Ca. 72; *Bradbee v. Christ's Hospital*, 4 M. & G. 756; *Murphy et al. v. Cotton et al.*, 14 U. C. R. 426.

GALT, J.—In giving judgment on the application to revoke the power and authority of the arbitrators in this case, we expressed our opinion that it was imperative on the arbitrators, under the terms of the reference in this case, to state, for the information and guidance of this

Court, any legal point raised on either side, and any refusal to report on such legal points so raised, or any attempt to prevent the Court from seeing on the face of the award the bearing or applicability of any such legal objections to any sum or sums awarded, would no doubt seriously endanger the validity of the award. This is not a case in which it was left optional with the arbitrators to state any legal objections raised by the defendants, as in the case of *Gibbon v. Parker*, L. T. Ex. p. 584, vol. v., N. S., and the cases therein cited, but similar to the case of *Murphy et al. v. Cowan et al.*, in many respects. In giving judgment in that case Robinson, C. J., says: "It was the intention of the parties, plainly expressed, that the arbitrators should put the defendants in a situation to take the opinion of the Court upon the question whether the evidence and the facts found by them warranted their award in point of law, considering the nature of the pleadings, for it was only the cause that was referred; and it appears to me, from the peculiar terms of the submission, that no judgment could be entered up for the sums awarded without an application to the Court; but however that may be, it is shewn that up to this time the arbitrators have never done what it was incumbent on them to do, to make their award valid, and to enable the defendant to take the opinion of the Court, as provided in the submission."

The Court in this case set aside the award, and it now remains for me to consider whether the course pursued by the arbitrators in the case now before us is open to the same objection.

It appears that in March, 1866, the plaintiff entered into a contract under seal with the defendants, to construct sections 3 and 4 of the gravel road of the defendants, on certain terms and conditions, as already stated. It is apparent that, as respects the item now under consideration, namely, the allowance made in the award of \$8949.20 for extra fill, it was for work on those sections; indeed, it was admitted, on the argument of this rule, by one of the learned counsel for the plaintiff, that not only

this item, but many of the others, were estimated for by the engineer of the defendants, Mr. Hamlin, under the contract for 1866, but contended that the plaintiff was not bound by Mr. Hamlin's certificates or estimates, and also that he was not bound by the contract prices. This contention is certainly in direct contradiction of the terms of the contract, and would require some very clear and distinct evidence to support it. When we bear in mind that there was a contract under seal between these parties, and that the defendants are a corporation who can, as a general rule, only contract in that way, we think the arbitrators were bound, by the terms of the submission, to have brought under our notice the evidence under which they considered the defendants liable for so large a sum of money for extra work on a portion of the work embraced in the contract, and for which extra work provision is made in the contract, more especially as their attention was expressly called to it by the legal exceptions taken by the defendants counsel. We are told by the plaintiff, in his affidavit, that the work done by him, covered by the award, was done upon bargains and contracts, but no information is given as to when the bargains were made, or by whom. In the award, the arbitrators by whom it was signed, state, "The work for which we have found in favour of the plaintiff, and which forms the several items aforesaid, was work and labour done and performed by the plaintiff for the defendants at their request, and under the said written contract, or as an extra to it, but upon separate bargains and contracts made by the plaintiff with the defendants, wholly unconnected with the said written contract, and independent thereof. We further find that it was not a part of such bargains and contracts that the defendants should be liable only upon the estimate of their engineer in the charge of the work." No evidence whatever is furnished to us of this most extraordinary statement, and we are called upon to believe that the defendants, who are a corporation, and consequently could have no possible personal supervision of the work,

are proved to have made bargains, leaving the quantity and price to be settled by the plaintiff. We are not told by whom those bargains were made, nor what was the proof of them to fix liability on the defendants.

Upon a careful consideration of all the facts before us, we cannot avoid expressing our opinion that the award is directly contrary to the terms of the reference, and is a studied attempt to prevent the Court from giving effect to the legal exceptions taken by the defendants. The course pursued by the majority of the arbitrators has been such that we do not think we can refer the award back to them, and that, to quote the judgment of the Court in *Murphy v. Cotton*, above referred to, "we must consider the object of the reference as having failed, and allow the parties to go again to trial."

We therefore make absolute the rule for setting aside the award and verdict.

GWYNNE, J.—It is impossible to read the affidavits before us in this matter, the bill of particulars attached to the record, the award itself, and the memorandum of the defendant's objections and requisition attached thereto, without arriving at the painful conclusion that the award has been framed with an ill-concealed design of defeating the right of the defendants, of having, in the terms of the submission, all points of law, properly arising upon the pleadings and evidence, reserved for the consideration of the Court, and with the intent of endeavouring to set at naught the judgment of this Court delivered upon the application made by the defendants for leave to revoke the submission.

It is admitted now by the plaintiff, as he states in his affidavit, that he makes no claim whatever upon the written contract under seal alluded to in the affidavits, and it is now also admitted, and indeed very apparent, that the plaintiff had no cause of action whatever against the defendants upon the sealed contract which was entered into between the plaintiff on the one part and the United

Counties of Huron and Bruce, on the other, for the performance of certain work upon sections three and four of certain gravel roads, contracted to be constructed for the said United Counties. That this was not always the plaintiff's idea is also apparent, for the bill of particulars originally attached to the record is entitled: "Detailed statement of Extra Work performed by Paul Ross on sections three and four, Bruce Gravel Roads, under contract of 1866." It is in respect of items in this bill of particulars that the award is made. The defendants' contention has always been that they are not at all liable, for that all the work claimed for was, as they contend, done under that sealed contract of 1866, which was produced and laid before the arbitrators. Although the plaintiff originally claimed for the work, as done under the contract, though as extras, that is, extras provided for to be paid in a special manner by the contract, yet, he at some time changed his tactics, for he now swears that he does not claim under the contract at all, but under separate contracts and bargains, when or in what matter entered into he does not state, and two of the arbitrators swear, also, that they have allowed nothing in respect of, or for anything done under the sealed contract, but that everything which they have allowed for, was done under separate bargains and contracts independent of the sealed contract.

Now, whether or not the work claimed for, and in respect of which the arbitrators have awarded in favour of the plaintiff, was work which came within the operation of the sealed contract, was a question of law; whether or not the plaintiff's evidence shewed any other contract entered into by the defendants, and binding upon them, is a question of law. The defendants had a right to insist, and did insist before the arbitrators, that they should submit with their award, for the consideration of the Court, the evidence which they should find established before them relating to these points, that the Court might be able to judge of its sufficiency in law. This they have

evaded doing, and have contented themselves with stating, by their award, that they have found as a matter of fact there were separate contracts and bargains which they have treated as binding upon the defendants. In this the arbitrators have either wilfully misconducted themselves, or most ignorantly conducted themselves, to the manifest wrong and injury of the defendants and to the obstruction of the due course of justice. I regret to feel obliged to say that I find it difficult to satisfy my mind that the arbitrators, who have signed the award in this case, have acted ignorantly.

The affidavits, filed in support of the motion, allege that, as matter of fact, there was no evidence whatever offered before the arbitrators of any contract for the work claimed for, with the exception of a mere trifle, other than the sealed contract referred to, which, it is submitted was not binding upon the defendants, and that the evidence clearly shewed that the work claimed for and allowed by the majority of the arbitrators was within the very terms and provisions of the sealed contract made with the united counties. The affidavits plainly charge the arbitrators who signed the award, with judicial misconduct. This charge the parties accused meet, not by shewing what evidence there was of any separate contract made by the defendants, but by simply denying the truth of the charge, and by swearing that in their opinion the evidence was ample to establish several separate contracts and bargains in justice binding upon the defendants. By this mode of proceeding, of withholding the evidence, upon which they have arrived at that legal conclusion, they effectually thwart the object of the defendants, namely, of submitting the question of the sufficiency of the evidence to the consideration of the Court. It would be a scandal to justice if such conduct should be for a moment countenanced or endured, and the withholding of the evidence upon which they have proceeded, affords in itself sufficient ground for setting aside the award, upon the ground that no answer whatever has been given to the grave charge involved in

the affidavits in support of the application. But we cannot read the affidavit of the arbitrators who have signed the award, and of the plaintiff, without seeing plainly that the evidence upon which the arbitrators have proceeded, as establishing contracts and bargains binding upon the defendants, is wholly inadequate for that purpose. The twenty-fourth paragraph of Mr. Whitehead's affidavit discloses the nature of the evidence which the arbitrators have deemed to be sufficient in law, to be binding upon the defendants. He there says: "That according to the evidence the whole of the said work done by the plaintiff for the defendants, upon the said bargains and contracts, apart from the said written contract under seal was so done upon and by the special order and instructions of the said Hamlin, as engineer for the defendants, *and from the scope of his general authority and his mode of carrying on similar works* for the defendants, with their approbation the said Thomas Holmes and I were very fully convinced that the said Hamlin had authority from the defendants to make the said bargains and contracts, and did so make them with the knowledge and approbation of the said defendants.

Now, it is part of the defendants' case that this engineer, to whose order the plaintiff had, by the sealed contract, agreed to submit himself in all things within the provisions of that contract, gave evidence before the arbitrators that the orders given by him, and which have been declared by the arbitrators to have been contracts and bargains entered into by him with the knowledge and approbation of the defendants, were in truth and in fact *orders* given by him in the terms and provisions of the sealed contract; so that, in effect, what the arbitrators have declared, seems to be that *orders* given and intended by the engineer to be given within the provisions of the sealed contract, in respect of work admitted to be within the sections mentioned in that contract, shall operate as distinct and separate contracts of the defendants every *order* a contract not under seal—apparently for the reason that the plaintiff could not recover in virtue of the contract which is under seal.

Whoever may be responsible for the course which appears to have been pursued in this case, I cannot but say, that it appears to me to be a flagrant attempt to defeat the ends of justice, and that the award and verdict must be set aside.

HAGARTY, C. J.—When defendants agreed to refer this cause and all matters in difference therein to arbitration, they stipulated that such reference was made “subject to such points of law as will properly arise on the pleadings and evidence.” They transferred to the arbitrators all the powers which a jury could exercise in determining all disputed facts, but they did not constitute them judges of the law as well as of the facts: they reserved to the Court, in which the suit was instituted, the decision of legal questions on the pleadings and evidence.

It was a question of fact, for arbitrators as for jurors, whether one or more contracts, outside and independent of the sealed contract, had been entered into; but it was a question of law whether any or all of the evidence adduced in proof thereof was legally sufficient to establish any such contract. For example, a corporation makes a sealed contract for certain specified work, to be paid for on certificate of a named engineer, whose decision each contracting party is to accept as final. Extra work, but still connected with and necessary to complete the original design, is done. The contractor offers to shew that the warden, or two of the councillors, verbally ordered this extra work to be done, and told him he should be paid its value. Defendants object that such evidence is legally insufficient to bind them. The arbitrators decide that it is quite sufficient, and merely report to the Court what the legal objection was, but that they found that there was a separate and independent contract by defendants. They do not report on what their decision proceeded, and thus prevent us altogether from judging of the validity of the legal objection.

It appears to me that, when a point arising on the evidence is to be reserved, such as the point just suggested,

the arbitrators should find the facts and evidence on which the alleged independent contract is based, and then the Court can judge of the weight and cogency of the legal objection thereto.

At *Nisi Prius* the Judge would have ruled on the evidence, and the Court *in banc* could be asked to review his decision.

The arbitrators here summarily shut the door on any such discussion. They say, in effect, "We find there was a separate, independent contract or contracts clearly established. The defendants object to the sufficiency of the evidence; but we hold it quite sufficient."

We said in our reported judgment (to which we fully adhere), "Any attempt to prevent the Court from seeing, on the face of the award, the bearing or applicability of any such legal objections to any sum or sums awarded would, no doubt, seriously endanger the validity of the award."

It is impossible to avoid seeing that an attempt, and a very bold attempt, has been made to oust the jurisdiction of the Court. I think it would be a reproach to the administration of justice if such an attempt should be successful.

We cannot but regret the very heavy expense incurred, and incurred to no purpose, on this reference. The uselessness of so large an expenditure can be only attributable to the unjustifiable course pursued by those who should have acted as impartial judges, in seeking to deprive the defendants of their clear right to have the legal effect of the evidence against them determined by the Court and not by persons to whose judgment it was never referred.

One extract from the affidavit of Whitehead will shew how completely they have chosen to determine the legal effect of evidence: "It is shewn, even by the evidence for the defence, the said engineer had a wide discretion in having work done for defendants, quite outside and independent of said written contract, and for such work it never was intended that payment should be made on the engineer's estimate only."

IN RE DELANEY V. MACNABB.

Order of Sessions to pay costs of appeal—Warrant of commitment—32 & 33 Vic. ch. 31, secs. 74, 75—Mandamus against justice—Parties to application—C. S. U. C. ch. 126, sec. 8.

The issuing of a warrant of commitment, under 32 & 33 Vic. ch. 31, sec. 75, is discretionary, not compulsory upon a justice of the peace, and the Court will therefore on this ground, as well as upon the ground that the party sought to be committed has not been made a party to the application, refuse a mandamus, if this be the proper remedy, which, in this case, it was *held* not to be, but that the application should have been under C. S. U. C. ch. 126, sec. 8.

Quære, whether an order of the Sessions, simply ordering costs of an appeal to be paid, without directing to whom they are to be paid, &c., under sec. 74 of the above Act, is regular.

This was an application for a *mandamus* upon Alexander MacNabb, Police Magistrate of the City of Toronto, directing him to issue a warrant of commitment against one Mason, in the matter of appeal in the Court of General Sessions of the Peace for the County of York, wherein the applicant was appellant and the said Mason respondent, and which said warrant the said MacNabb had signed and sealed, in order that the said Mason might be arrested thereunder for his default therein set forth, &c., &c.

From the affidavits filed it appeared that Delaney was, on or about the 1st March last, convicted, on the information of the said Mason, before the said MacNabb for having sold liquor on a Sunday; that from this conviction he appealed to the Quarter Sessions; that upon the hearing of the appeal the said conviction was quashed, and that the only form of judgment given was that upon the back of the said conviction, in the words, "Conviction quashed with costs;" and that an entry was made in the Sessions Book, kept by the Clerk of the Peace for recording the judgments and orders of the Court, in the same words; that during the same session of the said Court, the costs of such appeal were taxed and allowed, by the Judge presiding at said Sessions, at the sum of \$39.50; and at the foot of the bill of costs was written, in the proper handwriting of said Judge, "Taxed to \$39.50,—John Boyd, Chairman,

Sessions. 27th March, 1871 ;” and the order of the said Court was thereupon entered in the said Sessions Book in the words following : “ *Thomas Delaney, Appellant, v. George A. Mason, Respondent.* Costs taxed to the appellant against respondent, thirty-nine dollars and fifty cents, to be paid within ten days ; otherwise, process to issue ;” that the said costs were not paid within the said time, and that therefore, upon the application of Delaney, MacNabb issued his warrant of distress against the goods and chattels of the said Mason ; that the said warrant was afterwards returned unexecuted, for the reason alleged that the said Mason had no goods whereon to execute the same ; that upon such return said Delaney applied to said MacNabb for a warrant of commitment against the said Mason for want of such distress, and that said MacNabb granted such warrant, and delivered the same to a constable for execution, but that he afterwards ordered the execution of said warrant to be stayed, and that he had always refused to allow said warrant to be executed, and the same still remained unexecuted, and said costs were still unpaid.

Harrison, Q.C., shewed cause, and filed the affidavit of the police magistrate stating that, after the warrant of commitment had been issued by him, he was served with a notice by the said Mason that the order of the Court of General Sessions was illegal and irregular, and threatening legal proceedings against him if the said warrant of commitment was executed, and that it was upon receipt of this notice, which he shewed to the attorney for Delaney, that he directed the execution of the warrant already issued to be stayed.

There were several objections taken to the application, but it is only necessary to refer to two. The first was that the issuing of the warrant was discretionary with the justice of the peace under the terms of the Statute ; and the second, that Mason, the party against whom it was sought that the warrant should issue, should have been before the Court.

The following cases were cited on shewing cause to the rule: *Rex v. Broderip*, 5 B. & C. 239; *Sellwood v. Mount*, 1 Q. B. 726; *Rex v. Long*, 1 Q. B. 740; *Rex v. Huntley*, 3 E. & B. 172; *Regina v. Justices of Ely*, 5 E. & B. 489; *Gray v. Matthews*, 4 B. & S. 425; *Dickinson's Q. S.* 650, 657, 658, 659, 967; *Freeman v. Reed*, 9 C. B. N. S. 301; *Rex v. Hall*, 1 Harr. & Woll. 83; *Rex v. Justices of Somersetshire*, 1 Harr. & Woll. 83, *Note*.

Donovan, contra, cited *Regina v. Inhabitants of Yeoverly*, 8 A. & E. 807.

The Statutes relied on are referred to in the judgment of the Court, which was delivered by

GALT, J.—The clauses of the Statute 32 & 33 Vic., ch. 31, relied upon by the applicant in this case, are secs. 74 and 75. The first is, “If, upon any appeal, the Court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace, or other proper officer of the Court, to be by him paid over to the party entitled to the same, and shall state within what time the costs shall be paid.” The latter is, “If the same be not paid within the time so limited, the clerk of the peace, or his deputy, on application of the party entitled to the costs, shall grant to the party so applying a certificate that the costs have not been paid; and upon the production of the certificate to any justice or justices of the peace for the same territorial division, he or they *may* enforce the payment of the costs by warrant of distress, in manner aforesaid, and in default of distress he or they *may* commit the party against whom the warrant has issued, in manner hereinbefore mentioned,” &c., &c.

The case of *Rex v. Broderip* (5 B. C. 239) is an express authority in favour of the police magistrate. The Court there say, “It is not clear that it was the duty of the justice to issue his warrant in this case.” The words of the 9th section are, “that it shall be lawful for the mayor or justices to issue the warrant,” not that they are required to do so. Besides, it is at least doubtful whether the con-

viction, not having taken place upon examination on oath, was legal, and this Court will not compel a magistrate to do that which may subject him to an action of trespass." In the case now before us the words of the statute are, that the justice of the peace *may* enforce payment of the costs by warrant of distress, and in default of distress *may* commit the party, not that he *shall* do so. To use the very words of the judgment, in the case above cited, we may say it is at least doubtful whether the order of the Sessions was regular, as it does not direct payment of the costs as required by the statute to be made to the clerk of the peace.

The second objection is also fatal. There can be no doubt that Mason ought to be before the Court on this application, as he might then have shewn to the Court reasons why the warrant should not issue, and it is contrary to all principles of justice that a man should be deprived of his liberty without being heard. In truth, this application never should have been made: the Legislature has provided a very simply mode of procedure in cases like the present, and we cannot avoid expressing our regret that our attention was not called to it on the argument. The 6th section of ch. 126 Con. Stat. U. C. enacts, "In all cases where a justice or justices of the peace refuse to do any act relating to the duties of his or their office, as such justice or justices, the party requiring such act to be done may, upon an affidavit of the facts, apply to either of the superior Courts of common law in Upper Canada, or to the judge of the County Court, in which such justice or justices reside, for a rule calling upon such justice or justices, *and also the party to be affected by such act*, to shew cause why such act should not be done, and if, after due service of such rule, good cause be not shewn against it, the said Court may make the same absolute, with or without, or upon payment of costs, as may seem meet; and the justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required, and no action shall be commenced or prosecuted against such justice or justices

for having obeyed the rule and done the act required as aforesaid." The above statute was passed expressly for the protection of justices of the peace, and the present application falls within the provisions of the foregoing section. This section requires that the person to be affected by any order to be made, shall be served with a copy of the rule, and shall be made a party to it. This is an express recognition by the Legislature of what is in itself no more than the plainest principles of justice require.

Rule discharged, with costs.

CROWLEY V. AGRICULTURAL MUTUAL ASSURANCE ASSOCIATION OF CANADA.

Mutual insurance—False swearing—29 Vic. ch. 37, sec. 5—Pleading.

To a declaration, on a mutual insurance policy, averring the payment of the necessary premium for insurance, and setting out a certain condition indorsed on the policy issued to plaintiff, among other things, that any fraud, or attempt at fraud, or false swearing, on the part of the assured, should vitiate the policy, and stating a compliance with this condition, defendants pleaded, that the policy was made by defendants, and accepted by plaintiff, subject to a condition, that any fraud, or attempt at fraud, or false swearing, on the part of the assured, should cause a forfeiture of all claim under the policy: *avermnt*, that plaintiff stated under oath that he had paid to defendants all premiums, dues, and assessments which were due and owing at the time of the fire, whereas plaintiff had not at that time paid all premiums, &c., to defendants, whereby plaintiff was guilty of false swearing within the meaning of said condition. There was a further plea, setting up the provisions of sec. 5 of ch. 37 of 29 Vic. relating to Mutual Insurance Companies, and averring that on effecting said insurance plaintiff gave his premium or deposit note to defendants for his insurance, and that defendants afterwards lawfully made and levied an assessment on said premium or deposit note so given by plaintiff to the amount of \$4, and the same remained in arrear and unpaid for more than 30 days, whereby by force of said statute said policy became void:

Held, on demurrer, that both pleas were bad.

ACTION on a policy of insurance.

The declaration stated that by a policy, dated 30th November, 1867, made by the defendants, after reciting that plaintiff had paid defendants' a premium note of \$12 for insuring him, the plaintiff, against loss or damage by

fire, to the amount mentioned, on the property mentioned, for the time mentioned, there were certain conditions endorsed on the policy, among which was the following : " In all cases of loss or damage by fire the assured shall give immediate notice thereof to the secretary of the company, and within thirty days after such loss furnish to said secretary a particular account of such loss, signed and sworn to by him before a justice of the peace, setting forth the interest of the assured in the property, or in each part of it claimed for, and whether there was any and what insurances, or any or what other assurance covering it, or any part of it, at the time of the fire. He must state the origin or cause of the fire according to the best of his knowledge, information and belief ; how the building or buildings were occupied at the time of the fire ; in case of a building, its real cash value at the time ; in case of furniture or other personal property, he must give a bill or list, or description, of the articles lost or damaged, together with an estimate of the actual cash value, all forming part of his said affidavit ; and he must produce such other evidence as the directors of the company may reasonably require. The assured shall furthermore procure a certificate, under the hand of a magistrate contiguous to the place of the fire, not concerned in the loss, nor related to the assured or sufferer, that he is acquainted with the character of the person assured, and has made diligent enquiry into the facts set forth in the statement, and verily believes that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained loss or damage to the amount therein mentioned ; and the assured shall, if required, submit to examination under oath by an officer of the company, or by any person appointed by the company, and, if deemed necessary by the company, to a second examination, and subscribe to such examination when reduced to writing ; and until such proofs, declarations, certificates, and evidence are produced and examination permitted, the loss shall not be deemed payable. Any fraud, or attempt at fraud, or false swearing, on the part of

the assured shall cause a forfeiture of all claim under this policy." The declaration then contained an averment of interest, a loss by fire, and a general compliance with conditions, &c., in the usual form.

Defendants pleaded (as a second plea) that "the said policy of insurance was made by defendants, and accepted by plaintiff, subject to certain conditions indorsed thereon, among which conditions was the following, that is to say, "any fraud, or attempt at fraud, or false swearing, on the part of the assured shall cause a forfeiture of all claims under this policy": averment, that plaintiff made a statement under oath of the loss which he had sustained under said policy, and that by said statement plaintiff represented and swore that he had paid all premiums due and assessments to defendants, which were due and owing at the time of said fire, and that plaintiff had not at the time of said fire paid all premiums, dues, and assessments which were due to defendants, and that plaintiff was thereby guilty of false swearing, within the meaning of said conditions, in the statement so made."

There was a third plea, that defendants were a mutual insurance company under the law relating to mutual insurance companies, and by 29 Vic. ch. 7, sec. 5, it was provided, "In case any note given or to be given, for a cash premium of insurance, to such company, or to any agent or officer thereof, or any sum that may be hereafter assessed upon a premium or deposit note given, or to be given, to such company, or to any agent or officer thereof, remain in arrear and unpaid for thirty days after the same shall be payable, the policy of insurance held by the person in default shall thereupon become absolutely null and void:" *averment*, that at the time of effecting said insurance plaintiff gave his premium or deposit note to defendants for his said insurance, and that defendants afterwards, on the 27th October, 1868, lawfully made and levied an assessment on said premium or deposit note so given by plaintiff, to wit, to the amount of \$4, and that the same remained unpaid and in arrear for more than thirty days,

whereby, by force of said statute, said policy became absolutely null and void.

Demurrer, to second plea, that it was not shewn that the alleged statement was in any way material to, or required for, the purposes of said policy, or plaintiff's claim thereunder; and to third plea, that it was not shewn that plaintiff had notice of the assessment.

Harrison, Q. C., appeared for the demurrer.

Ferguson, contra.

The authorities cited are referred to in the judgment of the Court, which was delivered by

GALT, J.—As regards the demurrer to the second plea. The plaintiff, in his declaration, has set out in full the condition in which the words relied upon by the defendants occur. It is impossible not to see, on referring to the plea, that it was in connection with the proof of the plaintiff's loss that the statement complained of by defendants as being false was made, and it appears to me an attempt on the part of the defendants to induce this Court to believe there were two distinct conditions in the same words in the same policy. It is quite clear that the condition, as stated by the plaintiff, is the only condition in the policy bearing on this defence, and that the fraud or false swearing therein alluded to have reference to the claim of the plaintiff, and not to any immaterial or collateral subject. The case of *Ross v. Commercial Union Assurance Co.* (26 U. C. 552) is an express authority to shew that a false statement made by the plaintiff must be one bearing on the proof of the plaintiff's loss. The Court there say, "The condition should be construed with reference to its intent and object, and, so construed, the untrue statement has no bearing whatever upon, or relation to, the account of the loss or value of the building."

As respects the demurrer to the third plea. By sec. 74 of ch. 52 C. S. U. C., "The directors of a mutual insurance company, after receiving notice of any loss or damage by

fire sustained by any member, and ascertaining the same, or after the recovery of any judgment against the company for such loss or damage, shall settle and determine the sum to be paid by the several members thereof, or their respective portion thereof, and shall publish the same in such manner and form as they see fit, or as the by-laws prescribe." There is no clause in this statute rendering the policy void for non-payment.

By the fifth section of ch. 37 of 29 Vic., partly set out in the plea, it is enacted, that in case any note given, or to be given, for a cash premium, or any sum that may hereafter be assessed upon a premium or deposit note, shall remain in arrear and unpaid for thirty days after the same shall be payable, the policy of insurance held by the persons in default shall thereupon become null and void. By section 8 of 31 Vic. ch. 32 it is enacted that, in addition to the notices now required to be published, it shall be the duty of every mutual insurance company to mail to the person assessed, or his or her post-office address, as given at the time of the insurance being effected, or thereafter, a notice containing the particulars of the assessment against such person. The demurrer to the third plea raises the question as to whether it is necessary for the defendants, in order to avail themselves of the defence under the 5th sec. of 29 Vic. ch. 37, to aver that the publication of the assessment, required by 74th section of ch. 52 C. S. U. C., was duly made, and the notice above referred to was duly mailed to the assured, the plaintiff contending that the plea is defective for want of such averments, while the defendants assert that the allegation in the plea, that the defendants "lawfully made and levied an assessment on the said premium or deposit note so given by the plaintiff, to wit, to the amount of \$4, and that the same remained in arrear and unpaid," necessarily includes every allegation requisite to sustain the plea. It is a fundamental rule of pleading that facts, and not conclusions of law, to be drawn from those facts, are to be pleaded, as it is for the Court to draw conclusions upon the facts, as stated to them. The

plea is in direct contradiction of that rule, and is therefore in my opinion bad. The plea, in this case, is intended to work a forfeiture, and, as the Legislature has expressly required certain steps to be taken, and certain notices to be published and transmitted to the assured, before such forfeiture shall take place, I am of opinion that it is incumbent on the defendants to aver compliance with these provisions, and that it should not be left merely to be inferred that they have been fulfilled. Moreover, in truth, it may be said that the assessment was, in the words of the plea, made and levied, and that the same remained in arrear and unpaid, although, for want of a compliance with the requirements of the Legislature, the right to enforce payment might be in abeyance, and no forfeiture incurred.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—JAMES CARRUTHERS DONALDSON, DAVID THOMAS DUNCOMBE, WILLIAM McDOWELL, JOHN LAWRENCE LYON, WILLIAM HENRY FULLER, JOHN TAYLOR, JOHN SKIRVING EWART, JOHN CRERAR, WILLIAM HENRY BARTRAM, WILLIAM GLENHOLME FALCONBRIDGE, GEORGE OSCAR ALCORN, GEORGE WASHINGTON BADGEROW, JAMES MUIR, JAMES MASSON.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF COMMON PLEAS,

FROM MICHAELMAS TERM, 33 VICTORIA, TO EASTER TERM, 34 VICTORIA.

ACCOMMODATION NOTE.

See PROMISSORY NOTE, 1.

ACTION

For money had and received, will not lie against County Treasurer, at suit of township, for non-resident land-tax paid over by him to township Reeve before appropriation to township.]—See NON-RESIDENT LAND TAXES, 1.

By husband and wife, for seizure of wife's goods.]—See MARRIED WOMAN, 1.

Against husband, for goods supplied to wife.]—See HUSBAND AND WIFE.

ADVERSE POSSESSION.

Title by.]—See SECONDARY EVIDENCE.

AGREEMENT TO CONVEY LAND.

Construction—County Court appeals—Manner of sending up.

Defendant agreed to execute to plaintiff a deed of certain land, with bar of dower, on payment of \$200, and that if the Crown Lands Department would not “recognize” his assignment of said land, defendant would return the purchase money to plaintiff :

Held, that the true construction of the contract between the parties was, that the money was to be refunded in the event of the Crown Lands Department not acknowledging that defendant's vendee had, by virtue of the assignment, acquired a beneficial interest in the land, entitling him to the benefit of the contract between the Crown and the original locatee.

Observations on the manner of sending up cases from the County Courts on appeal to the Superior Courts.—*Arthur v. Monck*, 76.

APPLICATION.

Of insurance moneys by mortgagee.]—See DEBT ON BOND.

ARBITRATION AND AWARD. ASSESSMENT OF DAMAGES.

Omission to state questions of law for the Court—Award set aside.

Where, on a submission to arbitration of a cause and all matters in difference therein, *subject to such points of law as should properly arise on the pleadings and evidence*, a question arose as to the sufficiency to bind one of the parties, of certain evidence tendered respecting some extra work done outside of the sealed contract, entered into between the parties, and the arbitrators, instead of reserving this for the opinion of the Court, themselves decided that the evidence was quite sufficient, merely reporting what the legal objection was, the Court, with very strong observations on the flagrant disregard of their plain duty under the submission, refused to refer the matter back to the arbitrators, but simply set aside their award and the verdict found by them in favour of the plaintiff.—*Koss v. The Corporation of Bruce*, 548.

See PARTICULARS, 1.

ATTORNEY.

Attorney and client—Security for future services—Foreign law—Pleading.

Held, that a security taken from a client by an attorney or counsel, for costs to accrue in respect of services to be rendered to the client, is invalid and cannot be enforced.

Held, also, that to displace the defence to a note, by shewing the *lex loci contractus* as different from the law of our Courts, such foreign law must be replied and set out on the record.—*Hope v. Caldwell*, 241.

In case of separate assessment, proper as to some counts and improper as to others, and general verdict entered, one will be confirmed and the new trial ordered as to other.—See NEW TRIAL.

AWARD.

See ARBITRATION AND AWARD.

BANKS.

Royal Canadian Bank—Charge of 8 per cent. interest on note discounted—6 per cent. only recoverable from maturity—27 & 28 Vic., ch. 85, sec. 21—Construction.

Held, that the plaintiffs, a banking institution, having stipulated for and retained, in discounting a note, interest at a larger rate than 7 per cent., were not entitled to avail themselves of the provisions of their Act of Incorporation (27 & 28 Vic, ch. 85, sec. 21), allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than 7 per cent., which was held to be the meaning of the Act, and that, therefore, the note bearing no rate of interest on its face, they were not entitled to more than 6 per cent. from its maturity.—*Royal Canadian Bank v. Shaw et al.* 455.

BILL STAMPS.

See PROMISSORY NOTE, 2.

BOND.

See DEBT ON BOND.

BUTCHER.

See BY-LAW, 5.

BY-LAW.

1. *Sealing of—Notice—22 Vic. ch. 66, secs. 75 and 76—29 & 30 Vic., ch. 51, sec. 196, sub-sec. 6—“Majority”—Construction.*

Held, that a “majority” of the electors, referred to in the Railway Act of 1859 (22 Vic., ch. 16, secs. 75 & 76) and the Municipal Institutions Act of 1866 (29 & 30 Vic., ch. 51, sec. 196, sub-sec. 6), required to assent to a by-law, is not an absolute majority of all the existing qualified electors, but a majority of those coming forward to vote for the same.

Held, also, that the notice of a by-law for the granting of aid by a municipality to a Railway Company, should be published in accordance with the provisions of the Municipal Acts.

Held, also, that the objection to a by-law that it was not sealed, when submitted to the electors, was untenable.—*Jenkins v. The Corporation of the County of Elgin*, 325.

2. *Adoption by majority—Voting list of voters under 29 & 30 Vic. ch. 51, sec. 196, sub-sec. 7—Construction.*

Held, that the statute providing for a poll to be taken for the passage of a by-law, which requires the assent of the electors of a municipality, requires only that the by-law shall be adopted by the majority of those qualified electors who actually do vote, and not of those entitled to vote.

Held, also, that the list which the statute (29 & 30 Vic., ch. 51, sec.

196, sub-sec. 7) requires the Clerk of the Municipality to furnish the Returning Officer with is a list containing the names of all freeholders and tenants of realty assessed on the roll to an amount sufficient to entitle them to vote at any municipal election.—*Erwin v. Township of Townsend*, 330.

3. *Drainage of lands—32 Vic., ch. 43 [Ont.]—Sufficiency of.*

To a by-law, passed under 32 Vic., ch. 43 (Ont.), was annexed a schedule (declared to be part of the by-law), entitled, “Schedule shewing the benefit to be derived by each lot from the drainage to be performed under the by-law:” *Held*, that such a by-law, containing such a schedule, sufficiently indicated that the lands so assessed were assessed as the only lands within the municipality regarded as benefited by the proposed work; and that it was not necessary that the by-law should specify the mode of ascertaining and determining the property to be benefited under sub-sec. 4 of sec. 2 of the said Act.

Held, also, that, supposing the question open for the consideration of the Court, whether or not the lands assessed were the only lands benefited, which it was objected the by-law did not shew, the onus of proving that other lands were also benefited, which should have been assessed, lay upon the applicants against the by-law, and that in this they had failed. But, *held*, that the objection that all the lands which would be benefited had not been assessed, or that the assessments upon the respective lots were overcharges, or that the by-law did not provide properly for determining what lands were benefited, were not grounds for moving to quash the same, as by the

said 4th sub-section an appellate tribunal is appointed.

Held, also, that an objection, that the petition mentioned in the by-law was not signed by a majority of the resident owners of property assessed, &c., was not open to the applicants upon the motion, but that if it were, the onus of proof was upon them, and in this also they had failed.

Held, also, that the 3rd section of the by-law, set out below, was not open to the objection that it did not properly provide for a special rate sufficient to include a sinking fund for payment of the debentures therein mentioned, but provided for levying and raising certain instalments, with interest.

Held, also, that there was no necessity for the by-law to name a day in the financial year from which it was to take effect, as this was not required by the statute which authorized its passage.

4. *By-law of township prohibiting sale of liquors—Repeal of by village, after separation from township, without assent of electors—32 Vic., ch. 32, sec. 10 (Ont.)*

Held, that the municipal council of a village, incorporated in, and separated from, a township, in which before, and at the time of, said incorporation a by-law existed prohibiting the sale of intoxicating liquors in shops and places other than houses of public entertainment within said township, could not, by a by-law not submitted for the approval of the electors of the village corporation, repeal the prohibiting by-law so far as it affected the village municipality, but that the by-law must be passed upon by the electors under 32 Vic., ch. 32, sec. 10 (Ont.)

—*In re Cunningham v. The Corporation of the Village of Almonte*, 459.

5. *By-law—Prohibition to huckster under 29 & 30 Vic., ch. 51, sec. 296, sub-secs. 11, 12, and 31 Vic., ch. 30, sec. 32 (Ont.)—Invalidity.*

A by-law of a municipal corporation, purporting to be passed under 29 & 30 Vic. ch. 51, sec. 296, sub-secs. 11 and 12, and 31 Vic. ch. 30, sec. 32 (Ont.) prohibiting any huckster, butcher, or runner, from buying or contracting for any kind of fresh meat or provisions on the roads, streets, or any place within the town on any day before the hour of 9 o'clock, a.m., between 1st April and November, or before 10 a.m. during the remainder of the year, was held bad, and ordered to be quashed.—*Wilson v. The Corporation of the Town of St. Catharines*, 462.

Stoppage of ancient roads by.]—*See HIGHWAY.*

CHATTEL MORTGAGE.

1. A chattel mortgage purported to secure \$1,600, acknowledged to have been paid by the mortgagees, the property mortgaged being 2,500 logs, and the proviso for redemption being in payment of the \$1,600, at 7 per cent., on or before 1st September, *or by delivering lumber of first and second classes, as agreed between the parties, to that value.* The agreement, which was of even date, declared that, in consideration of the \$1,600, then paid and advanced to the mortgagors by plaintiffs, "*which sum is collaterally secured to the parties by chattel mortgage, bearing even date herewith, on the same logs,*" &c., the mortgagors agreed to deliver to plaintiffs all the first and second

class lumber made at their mill on or before 1st October then next; and plaintiffs agreed to pay at the prices named, "*or, if the advance now made is not exhausted, to allow them for the lumber so delivered at rates aforesaid.*"

The affidavit of the mortgagees was in the usual form, under sec. 2 of the Chattel Mortgage Act.

Held, that the mortgage was one within the 1st and 2nd sections, and not the 5th section, of the Chattel Mortgage Act, and that on the authority of *Baldwin v. Benjamin*, 16 U. C. 52, it was good, and could be upheld against the objection, that it did not truly shew the real transaction between the parties.—*Beecher et al. v. Austin*, 334.

2. *Trover for mortgaged chattels—Removal by stranger—Copy of mortgage not filed within two months—C. S. U. C. ch. 45, sec. 9—Advance to mortgagor—Validity of mortgage.*

Goods covered by chattel mortgage were removed from the County, either on an alleged sale by mortgagor, or against his will, or stolen from him, and were sold in another County to the defendant, mortgagor being, at all events, no party to the removal. Just over two months from removal, mortgagee, on hearing where they were, went and demanded them from defendant :

Held, that such a removal was not within the statute, requiring a copy to be filed within two months of the permanent removal of the goods from the County.

The mortgagor had agreed to deliver lumber to plaintiff, at specified prices, up to September, 1870, which plaintiff was only bound to pay for as delivered, and not to make ad-

vances ; but at the date of the mortgage plaintiff had advanced about \$250 beyond the value of the lumber delivered, and to assist him still further he advanced \$450 more, on his agreeing to execute the mortgage to secure both amounts, which were to be repaid by lumber or money in two months, the security covering the goods in dispute as well as the lumber :

Held, that the mortgage was an independent contract, an advance of money to be repaid at an earlier date than that named for the delivery of the lumber, that it was not invalid, as not shewing the true dealing between the parties, and that the affidavit, which was in the common form, was sufficient, and that it would also be sufficient under *Beecher v. Austin*, ante 334.—*Clarke v. Bates*, 348.

CLIENT.

See ATTORNEY.

COLLATERAL SECURITY.

Promissory note—Equitable plea—Right of surety to call on creditor to realize collateral securities.

To an action on a promissory note the defendant, an indorser, pleaded "that he indorsed the note as surety for the makers ; that it was agreed that the makers should transfer to the plaintiffs, as surety for the payment of the note, by way of mortgage, a certain schooner, and that the plaintiffs agreed to hold the said vessel for the benefit and indemnity of the defendant ; that, in pursuance of such agreement, the vessel was assigned to the plaintiffs, and it thereby became the duty of the plain-

tiffs, when requested by the defendant, to sell the vessel, under a power of sale contained in the mortgage, for the benefit of the defendant; that the defendant requested plaintiffs to sell said vessel; that the plaintiffs refused and neglected to comply with such request, and that the vessel was subsequently lost, whereby the defendants lost the benefit of the security of the said vessel:

Held, that if the plea intended to assert that wherever a creditor takes a mortgage from a principal debtor with power of sale, accompanied with the personal obligation of a surety, it becomes an imperative duty imposed upon the mortgage creditor, upon the request of the surety, at any time to sell the mortgaged property upon default committed, at the peril, if he does not do so, of losing the benefit of the contract of suretyship, such proposition cannot be sustained in law; and that if the defendant intended to rely on an express agreement to this effect, the evidence would not sustain such contention.—*Bank of Montreal v. Davy et al.* 179.

COMMITMENT.

Warrant of, discretionary with Justice of Peace under 32 & 33 Vic. ch. 31, sec. 75.—See JUSTICES OF THE PEACE.

COMMON MONEY COUNTS.

Promissory note—Indorsement after payment by maker—Payment to indorsee under compulsion of law—Right to recover from indorser as money paid to his use.

He'd, affirming the judgment of the Court of Common Pleas, 20 C. P. 295, that where defendant held a note, made by plaintiff and one B., as security for B.'s debt, and, after payment by B., without plaintiff's knowledge at the time, indorsed it to W., whom plaintiff was obliged to pay under compulsion of law, the payment to W. was made for the use of defendant, and that plaintiff could recover the amount from him as money paid to his use.—*McKindsey (Respondent) v. Stewart (Appellant)*, 226.

Money had and received will not lie against County Treasurer for moneys paid over to Township Reeve, before appropriation, and misapplied.]
—See NON RESIDENT LAND TAXES, 1.

See PARTICULARS.

CONTINUING GUARANTEE.

Death of coguarantor—Liability of survivor.

Defendant and another addressed to plaintiff a joint note in these words: "In consideration of your supplying to Mr. John McGuire supplies of, &c., out of your store for his business, we agree to become responsible for the payment of \$200 for such goods, and guarantee the payment of that amount, whether the same be due on note or book account, to you for said hardware, iron, &c.": *Held*, a continuing guarantee.

Held, also, following Bradbury v. Morgan, 1 H. & C, 249, that the death of one of the guarantors did not extinguish the guarantee, it not appearing that any notice had been given to plaintiff on behalf of the estate of deceased, or that the survivor supposed he was released by

the death of the other, but, on the contrary, acknowledged his liability as still subsisting, and promised to settle.—*Fennell v. McGuire*, 134.

CONTRACT.

See RESCISSION OF CONTRACT.

CONVICTION.

Conviction for selling liquor on Sunday—32 Vic. ch. 32, sec. 23 (Ont.)—*Omission to negative requisition for medicinal purposes*—*Qualification of magistrate*—*Evidence*.

A conviction for selling liquor on a Sunday, in contravention of 32 Vic. ch. 32, sec. 23 (Ont.), omitted to state that the liquor was not supplied upon a requisition for medicinal purposes: *Held*, bad, and the conviction was quashed.

The only evidence offered in proof of the magistrate, before whom the recognizance in this case had been taken, not being properly qualified, was a certificate, purporting to be under the hand and seal of the Clerk of the Peace, that he did not find in his office any qualification filed by the magistrate: *Held*, insufficient.—*Regina v. White*, 354.

COUNTY COURT.

In cases in, where issues in law and fact on same record, Law Reform Act does not apply.—See LAW REFORM ACT.

Special case, in action in, not cognizable in Superior Court.—See LAW REFORM ACT.

COVENANT.

Not controlled by contemporaneous memorandum.—See LEASE.

See RELEASE BY OPERATION OF LAW.

CRIMINAL LAW.

In indictment for refusing to swear voter on requisition of agent of candidate, omission of agent's name will vitiate.—See INDICTMENT.

Recording in poll-books names of voters refusing to swear not an indictment offence.—*Ib*.

DAMAGES.

For detention of dower.—See DOWER.

See NEW TRIAL, 2.

DEBT ON BOND.

Mortgagor and mortgagee—27 & 28 Vic., ch. 31—*Application of insurance moneys received by mortgagee*—*Pleading*—*Payment*.

On 19th February, 1868, H. mortgaged certain land to one of defendants, to secure payment of \$2,400, as follows:—\$500 in two years, and the balance in five years from that date, with interest in the meantime half-yearly. The mortgage was in the usual statutory form, and contained an insurance clause binding the mortgagor to insure the buildings on the land in at least \$1,500. Subsequently an insurance company granted to H. a policy of insurance in the sum of \$1,500 on the buildings, and \$500 on machinery therein. In the body of the policy the benefit of the insurance was secured to plaintiff (apparently in anticipation of his becoming the holder of the mortgage), thus: "Any claim for loss to be paid to Robert Green, of

Guelph." Defendants afterwards assigned this mortgage to plaintiff, and both defendants entered into a bond to plaintiff, of same date, in a penalty of \$1,000, the condition of which, after reciting the assignment, and that the first instalment of \$500, under the mortgage, would fall due 19th February, 1870, provided that if H. should pay that instalment to plaintiff, when due, the bond should be void. H. then failed, and the instalment due 19th February, 1870, was not paid. The insured property was burned some months afterwards, and in January following plaintiff received, by virtue of the policy, the full amount of the insurance money (\$2,000), which was retained and applied by him to his own use. He then sued defendants on their bond.

The defendants set up the receipt and retention by the plaintiff of the insurance moneys, as amounting to a payment, on account of the mortgage debt, of a sum more than sufficient to satisfy the first instalment and interest, and contended that their bond was consequently discharged :

Held, no defence ; for, 1st, the bond being forfeited by condition broken, the facts relied on could not be set up as a legal bar ; and 2nd, either the insurance moneys received by the plaintiff (there being no stipulation as to their application) had not been legally applied, and could not be regarded as applied in *satisfaction* of any part of the mortgage debt ; or, if capable of being so applied, they might be applied at the sole pleasure of the plaintiff in such a manner as to insure to him the full benefit of the defendant's bond as an effectual security for the payment of the first instalment, as mentioned in the condition.—*Green v. Hewer et al.* 531.

DEDICATION.

Of highway.—See HIGHWAY.

DEED.

Sufficiency of description in.—
See TAX SALE.

DEMISE OF LAND.

Land to be chopped and cleared, whether liable to rent.—*Construction.*

Plaintiff demised to defendant certain land at "the clear yearly rent of \$1 50 per acre of cleared land, on 1st February in each year, one-half in cash and one-half in work on said land, in clearing and fencing as hereinafter mentioned," with a covenant for payment of taxes by defendant, with liberty to deduct one-half, exclusive of statute labour, from the rent, one-half from the money and one-half from the rent to be paid in labour, and defendant within the first year to make and put up in the fences on said cleared land 2,000 rails, for which he was to be allowed out of said rent \$20, viz., \$10 out of the money rent, and \$10 out of the labour rent ; with the further agreement, as to the rent to be paid in work, that the defendant should be allowed at the rate of \$13 per acre for the land which he should chop, log, clear, and fence, in payment of said rent. Then there was another clause, "that the portion of said lot now chopped, *but not cleared*, and also the portion under contract with L. McKay for chopping, shall be logged, cleared, and fenced, within two years from the date, by the said lessee, who, in return for his work *on said portions* of land, shall have two crops therefrom free of rent, and shall afterwards pay the same rent

per acre for said portions as for the land now cleared : ”

Held, that there was nothing expressed in the lease to charge the tenant with rent for the land to be chopped, cleared, and brought into cultivation by him, nor could any such liability be implied.—*Jones v. Montgomery*, 157.

See VARIANCE.

DEPOSIT RECEIPT.

Transfer—Notice of revocation—Payment to transferee after notice of revocation—Equitable defence—Demand before action.

Plaintiff deposited with defendants a sum of money and received from them the usual deposit receipt, stipulating for payment of interest provided the money remained not less than three months from date of deposit, and providing for fifteen days' notice to be given of its withdrawal, on which notice interest was to cease. Subsequently plaintiff signed his name thereto and delivered it to the endorsees. Before S. & Co. notified defendants of the transfer to them plaintiff gave them notice that he revoked and countermanded it, but defendants, notwithstanding, paid it over to S. & Co. on receiving an indemnity from them. Plaintiff subsequently made a formal demand upon defendants for the money, which was not complied with :

Quere, in an action by plaintiff against defendants, how far defendants were authorized to set up, in answer, as a payment good in equity, that the deposit receipt had been transferred by plaintiff to S. & Co. accordingly.—*Maunder v. Royal Canadian Bank*, 492.

DISTRESS.

For rent to become due on forfeiture of covenants.—See LANDLORD AND TENANT, 1.

After lapse of six months.—See LANDLORD AND TENANT, 2.

See MARRIED WOMAN, 1.

DOUBLE FRONTAGE LOTS.

Opening road, in case of, without by-law.—See TRESPASS.

DOWER.

Judgment of seisin under 32 Vic., ch. 7, sec. 16 (Ont.)—Damages for detention—Statute of Merton.

A judgment for seisin of dower, under sec. 16 of 32 Vic. ch. 7, (Ont.) is absolutely final and conclusive, and there is no provision of law in such a case entitling a demandant to any damages of any nature or description, nor any mode of proceeding provided by law for ascertaining any such damages.

The Statute of Merton remarked upon, and distinguished.—*Linfoot v. Duncombe*, 484.

DRAINAGE.

Under 32 Vic. ch., 43, (Ont.)—See BY-LAW, 3.

EJECTMENT.

Ejectment by Sheriff's vendee—Production of ven. ex. and deed reciting fi. fa.—*Evidence.*

Held, in ejectment by the Sheriff's vendee of land, under sale on *fi. fa.*, that the production of the *ven. ex.* under which the sale took place, and of the Sheriff's deed, which recited the *fi. fa.*, was sufficient *prima facie*

evidence to enable plaintiff to recover against the judgment debtor.—*Low v. Hicks*, 113.

Notice of title.—See ESTOPPEL.

See SECONDARY EVIDENCE.

ENTRY.

Date of right of.—See LIMITATIONS (STATUTE OF).

See SECONDARY EVIDENCE.

EQUITABLE PLEADINGS.

See COLLATERAL SECURITY.

“ PROMISSORY NOTE.

“ DEPOSIT RECEIPT.

ESTOPPEL.

Tenancy at will—Ejectment by landlord against tenant's heirs—Proof of title.

A. entered into possession of land under the authority of, and by permission of B., who made him a verbal promise for a deed, to be executed as soon as he himself should receive a conveyance from M., whose tenant at will he was, and who had in the meantime died; *Held*, that A. having entered under B., his heirs were estopped from disputing B.'s title, and that they could be ejected by B. *Held*, also, that B. having entered under M. originally, notice of title “under M., who derived title from the Crown,” was sufficient to enable B. to recover.—*Armstrong v. Armstrong et al.*, 4.

See OSGOODE HALL.

EVIDENCE.

Wrongful seizure of goods—Evidence of liability.

Plaintiff issued an attachment in insolvency against one M., and obtained for H., his book-keeper, a warrant as sheriff's bailiff, with which he despatched him to where M. carried on business, instructing him to see about the goods in his possession, and, as H. thought, telling his solicitors the goods were to be seized. H. accordingly went and seized the goods, which were at the time being sold at auction for plaintiff, who claimed to have bought them from M. On his return H. informed defendant, who approved of what he had done. It also appeared that defendant's attorney had given the writ to the sheriff, with instructions to seize the goods:

Held, following *Slaght v. West*, 25 U. C. 391, that there was evidence to go to the jury of defendant's liability for the seizure.—*McClevertie v. Massie*, 516.

By tax purchaser, under 33 Vic. ch. 23, (Ont.)—See TAX SALE.

Of wife's title to goods.—See MARRIED WOMAN, 1.

Of magistrate not being qualified.—See CONVICTION.

Production of ven. ex. and sheriff's deed reciting fi. fa., sufficient prima facie evidence to enable sheriff's vendee to recover against judgment debtor.—See EJECTMENT.

See COLLATERAL SECURITY.

“ PARTICULARS.

EXECUTORY DEVISE.

When or to be read AND.—See WILL, 1.

EXPRESS COMPANY.

Undertaking to carry and present note for payment.—See PROMISSORY NOTE, 3.

FEE SIMPLE.

See WILL, 2.

FOREIGN LAW,

Must be pleaded.—See ATTORNEY.

GOODS.

Property in.—See REPLEVIN.

GOODS SOLD.

Liability of husband for, where ordered by wife.—See HUSBAND & WIFE.

See RESCISSION OF CONTRACT.

GOODWILL.

Right of distress for price of.—See LANDLORD AND TENANT, 1.

GUARANTEE, (JOINT.)

See CONTINUING GUARANTEE.

HIGHWAY.

Dedication—User by public—Stoppage by by-law.

Where a road was laid out over land by the owners thereof, and was so used by the public, without interruption, for 30 or 40 years: *Held*, that it had become a public highway, and could not be stopped up by by-law of the municipal council, particularly at the instance of a purchaser from one of such owners of the land, with knowledge, too, on

his part, of the existence of the road.
—*Moore v. The Corporation of the Township of Esquesing*, 277.

HUCKSTER.

See BY-LAW, 5.

HUSBAND AND WIFE.

Action against husband for goods supplied to wife—Married Woman's Act.

Defendant, during several years prior to, and for part of the year 1862, had a shop which he and his wife, who lived with him, attended, the shop being divided into two parts, in one of which the defendant carried on a confectionery and saloon business, and in the other a fancy goods business, the latter being under the personal superintendence of the wife, who always gave the orders for the goods, which he, however, paid for. In 1862 defendant gave up the confectionery, &c., business, and then, as he stated, sold out the other business to his wife for a certain sum, she agreeing to pay him \$5 a week, which, however, she failed to do. She continued, with his permission, to carry on the fancy goods business, still living with him as before. There was no change either in the exterior or in the interior of the shop, except that the defendant no longer carried on the confectionery, &c., business there, though he was frequently seen on the premises. In 1869 the wife gave an order for the goods in question, just as she had always previous to 1862 been in the habit of doing: *Held*, that the business must be considered defendant's, and that he was liable to the plaintiff for the goods ordered in 1869.

Held, also, that the Married Woman's Act (C. S. U. C. ch. 73,) had no application to the case.—*Foulds v. Curtelett*, 368.

See SEPARATION DEED.

INDICTMENT.

Criminal law—Indictment for refusing to swear voter at agent's request—Omission of name of agent—Recording name of voter refusing to swear—C. S. C. ch. 6, sec. 55, subsec. 3.

In an indictment against a deputy returning officer at an election, for refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters, the omission of the *name* of the agent from the indictment will vitiate it.

In the same indictment another count charged defendant with entering and recording in the poll-books the names of several parties as having voted, although they had refused to take the oath prescribed by law:

Held, not an indictable offence, being a creature of the statute, which also prescribed the penalty and the mode of enforcing it.

Remarks upon the otherwise objectionable character of the indictment, in setting out in the indictment a copy of the poll-book containing a number of names, while none were mentioned in the indictment itself, a reference being merely made to the "said list."—*Regina v. Bennett*, 235.

INSOLVENCY.

Composition and discharge by majority of creditors—Pleading.

To an action on a promissory note and on the common money counts, defendant pleaded, 1st, that after making of note and incurring of liability he became insolvent, and a deed of composition and discharge, under the Insolvent Act of 1869, was entered into and executed by a majority of creditors, whereby defendant was discharged, which discharge was confirmed by the County Court Judge; 2nd, after making of note defendant became insolvent, assigned to an official assignee, and duly set forth plaintiff's claim, which plaintiff duly proved, after which a majority in number of creditors consented in writing to a discharge, which was duly confirmed, &c. *Replication*, to first plea, setting out the deed of composition, acknowledging the receipt from assignee of defendant's estate, of certain promissory notes, indorsed, for certain amounts, and payable at certain dates, and accepting same in payment, and stating that the creditors therein named (of whom plaintiff was not one) accordingly discharged him, and authorized the restoration of the estate to him.

Replication to 2nd plea, that the alleged consent in writing was the deed of composition and discharge in the above replication set out, and that, in pursuance of said deed, said assignee restored to defendant his estate.

Replication, on equitable grounds, that the composition was not made in good faith, nor for as large an amount as it should have been, as defendant well knew.

Held, on demurrer, that the replications to the 1st and 2nd pleas were good, and that the first plea was bad; that the 2nd plea was not open to

the objections taken to it, set out below, though, *quære*, whether good in all particulars against objections not taken.

Held, also, that the equitable replecution was bad.—*Shaw v. Massie*, 266.

See OFFICIAL ASSIGNEE.

INSURANCE.

1. *Mutual Insurance—Representation of cash value—Warranty—Question for Jury.*

Held, in an action on a mutual insurance fire policy, that a representation of preseat cash value is not a warranty, but is so far material that on the trial the jury should say whether or not there was an overvaluation to the knowledge of the applicant, and, if so, the policy is void.—*Riach v. Niagara District Mutual Insurance Co.* 464.

2. *Mutual insurance—False swearing—29 Vic. ch. 37, sec. 5—Pleading.*

To a declaration, on a mutual insurance policy, averring the payment of the necessary premium for insurance, and setting out a certain condition indorsed on the policy issued to plaintiff, among other things, that any fraud, or attempt at fraud, or false swearing, on the part of the assured, should vitiate the policy, and stating a compliance with this condition, defendants pleaded, that the policy was made by defendants and accepted by plaintiff, subject to a condition, that any fraud, or attempt at fraud, or false swearing, on the part of the assured, should cause a forfeiture of all claim under the policy : *averment*, that plaintiff stated under oath that he had paid

to defendants all premiums, dues, and assessments which were due and owing at the time of the fire, whereas plaintiff had not at that time paid all premiums, &c., to defendants, whereby plaintiff was guilty of false swearing within the meaning of said condition. There was a further plea, setting up the provisions of sec. 5 of ch. 37 of 29 Vic. relating to Mutual Insurance Companies, and averring that on effecting said insurance plaintiff gave his premium or deposit note to defendants for his insurance, and that defendants afterwards lawfully made and levied an assessment on said premium or deposit note, so given by plaintiff, to the amount of \$4, and the same remained in arrear and unpaid for more than 30 days, whereby, by force of said statute, said policy became void :

Held, on demurrer, that both pleas were bad —*Crowley v. Agricultural Mutual Assurance Association of Canada*, 567.

Application of insurance moneys by mortgagee.—See DEBTOR BOND.

See NEW TRIAL, 1.

INTEREST.

Charge of more than 7 per cent. by bank.—See BANKS.

INTESTACY.

See WILL, 2.

INVENTION.

See PATENT OF INVENTION, 1.

JUSTICES OF THE PEACE.

Order of Sessions to pay costs of appeal—Warrant of commitment—

32 & 33 Vic., ch. 31, secs. 74, 75—*Mandamus against justice—Parties to application—C.S.U.C. ch. 126, sec. 8.*

The issuing of a warrant of commitment, under 32 & 33 Vic. ch. 31, sec. 75, is discretionary, not compulsory upon a justice of the peace, and the Court will therefore on this ground, as well as upon the ground that the party sought to be committed has not been made a party to the application, refuse a mandamus, if this be the proper remedy, which, in this case, it was *held* not to be, but that the application should have been under C. S. U. C. ch. 126, sec. 8.

Quære, whether an order of the Sessions, simply ordering costs of an appeal to be paid, without directing to whom they are to be paid, &c., under sec. 74 of the above Act, is regular.—*In re Delaney v. McNabb*, 563.

LANDLORD AND TENANT.

Price of good-will of demised premises—Right of distress for.

Defendant, in consideration of the yearly rents, covenants, and conditions in the lease contained, leased certain premises to one M. at an annual rent, and as one of the covenants or conditions, in consideration of which the demise was made, after reciting that M. had agreed to pay \$700, *by way of additional rent*, for the purchase of the good-will of the demised premises, M. covenanted to pay the \$700 in ten quarterly payments of \$70 each, with a proviso that in case of forfeiture of any of his covenants, the said \$700, or the balance thereof, was to become at once due and payable *by way of rent*,

with a further covenant that if the term granted should be seized under execution or on attachment against M., or if M. should make an assignment or become bankrupt or insolvent, or take the benefit of any Insolvent Act, the then current quarter's rent should immediately become due and payable and the term become void. M. failed to pay any portion of the \$700, and after the accrual of the third quarterly payment became insolvent:

Held, that defendant had the right to distrain upon the goods on the demised premises for the three quarterly payments of \$70 each that had accrued due before the insolvency, but that, notwithstanding the different provisions contained in the lease, he could not, having regard either to the common law, the statute, 8 Anne, ch. 14, sec. 6, or the 14th section of the Insolvent Act of 1865, distrain for the whole \$700.—*Griffith v. Brown*, 12.

2. *Duration of tenancy until proceedings in equity taken—Distress after lapse of six months from proceedings taken.*

Defendant let to plaintiff certain premises "for the term of one year, to be computed from the 1st October, 1863, and so on from year to year, unless notice is given to the contrary, or equitable proceedings taken on mortgage hereinafter mentioned." Plaintiff continued to occupy under this lease, and in May, 1867, sub-let to one P. for one year, with right to P. to pay his rent to defendant. On 10th January, 1868, a Bill in Chancery was filed on the mortgage. In May following, P. paid rent to defendant up to the expiration of his year, and on the ensuing 25th July or August, defendant distrained upon

plaintiff for arrears of rent before the demise to P., and for rent from its expiration to 1st July, 1868 :

Held, that there was no tenancy subsisting at the time of the distress to justify the same, and that the payment of rent by P., after the commencement of proceedings in equity, did not create a new tenancy, as there was no evidence that P. had paid at plaintiff's request.—*Higgins v. Langford*, 254.

See MARRIED WOMAN, 2.

LAW REFORM ACT.

County Court cases—Issues in law and fact—Law Reform Act not applicable—Special cases in action in County Court, not cognizable in Superior Court.

In County Court cases, where there are issues in law and in fact upon the same record, the Law Reform Act does not authorize the issues in fact to be tried at the Assizes ; and where, after a trial under such circumstances, a case came before the Court, on motion against the verdict, the Court, after argument and consideration, refused to pronounce judgment on the merits of the case, as *coram non judice*, but merely set aside the verdict without costs.

In a County Court case, tried at the Assizes, after verdict for defendant *in that suit*, the parties agreed upon a special case *in the action in that Court*, and not upon a case originating in a Superior Court : The Clerk, with the approval of the Court, refused to receive it, on the ground that the only mode of bringing such a case before the Superior Court was the ordinary statutory one, by way of appeal.—*Pattypiece v. Mayville*, 310.

See RELEASE BY OPERATION OF LAW.

LEASE.

Covenant to repair—Contemporaneous memorandum specifying same.

Defendant demised to plaintiff a yard and wharf, covenanting, generally, to put the wharf into good and sufficient repair on or before a given day. The condition of the wharf was discussed between the parties, and a memorandum was drawn up by defendant and signed by both : "Work to be completed to put wharf in good repair : two stringers and one stringer to be put into place ; all that part of wharf not planked to be planked with new plank, and all the broken plank or holes to be repaired with sound plank." Plaintiff signed this memorandum before examining the wharf, and on defendant's representation that it was all right. These repairs were executed, but about a month afterwards the wharf fell in, caused, apparently, by the defective state of the caps on which the stringers rested. There was no clear evidence of an agreement as to any specified amount of repairs being taken as full performance of the covenant in the lease :

Held, that the memorandum did not control or modify the covenant, and that plaintiff was entitled to recover for the damage sustained by the wharf not having been put in good repair.—*Snarr v. Beard*, 473.

See DEMISE OF LAND.

" VARIANCE.

LIFE-ESTATE.

See WILL, 2.

LIMITATIONS, (STATUTE OF).

Ejectment—Right of entry—Date of.

Where one was in possession of land, claiming as assignee of a bond for a deed, made by the owner in fee, whose estate B. took by devise, *Held*, that an entry by B. *animo possidendi*, and that B.'s enclosing the land with a field of his own adjoining, caused the Statute of Limitations to cease to run as against B., and that the right of entry of B. and those claiming under him dated from an entry thereafter made by the defendants upon B.'s possession so obtained.—*Clements v. Martin et al.*, 512.

LIEN.

Goods sold subject to.—See SALE OF GOODS.

MAGISTRATE.

Insufficient evidence of qualification.—See CONVICTION.

MANDAMUS.

Not proper remedy to compel Justice of Peace to issue warrant of commitment under 32 and 33 Vic., ch. 31, sec. 75.—See JUSTICE OF THE PEACE,

[*On school trustees to levy rate, not answered by shewing alteration in school sections.*]—See SCHOOL RATES, 2.

MARINE INSURANCE.

1. *Loss—Evidence of seaworthiness.*

In an action on a marine policy, insuring plaintiff against perils of the lakes, loss arising from unsea-

worthiness excepted, where the evidence shewed that the vessel was in excellent condition and seaworthy when she left port, and apparently up to the time of loss; that a squall struck her, and over three hours after it was found she was leaking much, in consequence of which she filled and went down, there being no charge or suggestion of fraud, malpractice, overvalue, or anything whatever against plaintiff, the only remarkable circumstance being that in the protest made by the master and mate there was no mention of the squall, nor was any cause assigned for the leak or consequent loss, *Held*, that the Judge was right in submitting the case to the jury, and that the evidence fully warranted the finding for plaintiff.—*Dawson v. The Home Insurance Co.*, 20.

2. *Mortgagee of vessel alone named in policy—Right to recover for mortgagor's interest.*

Held, that a mortgagee of a vessel who was alone named in a policy as the assured, without any general words, or other indication of interest in any other person, but who had, in fact, insured the mortgagor's interest also, as disclosed to the insurers at the time, could recover the whole amount so insured on parol evidence of that fact.—*Richardson v. The Home Insurance Company*, 291.

MARRIED WOMAN.

1. *Action by husband and Wife—Distress upon wife's goods—Evidence—Married Woman's Act.*

A woman had been long in possession of chattels, said (but not proved) to have been left to her by her deceased husband, and using them with her children. She then married the

co-plaintiff. These goods were seized by a creditor of his, on a claim alleged to be for rent. but not proved :

Held, that her title before marriage was *prima facie* sufficient, and after her second marriage the goods were protected, under the Married Woman's Act, against her second husband's creditors.—*Corrie et al. v. Cleaver et al.* 186.

2. *Demise of wife's freehold by husband and wife without separate examination.*

Held, that the receipt of rent by the wife, with the husband's assent, from a tenant of her estate, after the expiration of a term, creates a tenancy from year to year.—*Johnston and Wife and Lewis v. McLellan*, 304.

See HUSBAND AND WIFE.

MORTGAGE.

Right to recover mortgagor's interest in vessel insured in mortgagee's name.—See MARINE INSURANCE, 2.

MORTGAGOR AND MORTGAGEE.

See DEBT ON BOND.

MUNICIPAL CORPORATIONS.

May maintain trespass against timber licensees for cutting and removing timber from road allowances, after by-law and notice thereof to them.—See ROAD ALLOWANCES.

MUTUAL INSURANCE.

Note for incidental expenses—Non-payment within thirty days—Non-avoidance of policy—29 Vic. ch. 38, sec. 5.

Held, that a note, made by the insured in the mutual branch of a Mutual Insurance Company, for the sum of \$3, part of the sum of \$36, for which the insured had already given his deposit or premium note, such \$3 representing the portion of the deposit note payable to the treasurer for incidental expenses under C. S. U. C. ch. 52, sec. 22, was not a note given for a cash premium of insurance within the meaning of 29 Vic. ch. 38, sec. 5, so as utterly to avoid the policy if the note should not be paid within 30 days after the same was made payable.—*Ellis v. Beaver and Toronto Mutual Insurance Company*, 84.

See INSURANCE, 1, 2.

NEW TRIAL.

Exorbitancy in sworn statement of loss—*New trial.*

Where, in an action on a fire policy, plaintiff, in his statement of loss, swore that his damage amounted to about twelve times the amount actually proved, and for which he actually obtained a verdict, and the Judge before whom the case was tried was dissatisfied with the finding, the Court, notwithstanding the usual practice as to new trials where the defence charges a criminal offence, granted a new trial, costs to abide the event.—*McMillan v. The Gore District Mutual Fire Insurance Company*, 123.

2. *Several counts in declaration—Damages separately assessed*—*New trial as to some counts.*

Where there are several counts in a declaration, and separate damages have been properly assessed on some of the counts and improperly assessed on the residue, but the ver-

dict has been entered generally for the whole amount so assessed, the Court will confirm the finding as to the one, ordering the verdict to be entered for that amount, and direct a new trial as to the other.—*Ainslie v. Ray*, 152.

NON-RESIDENT LAND TAXES.

1. *Non-appropriation by county council—Payment by treasurer to township Reeve—Action by township against treasurer—Nonsuit.*

Held, that all moneys received by the county treasurer from non-resident land tax, either from the owners, or from the proceeds of tax sales, do not become in his hands the moneys of any particular municipalities, so as to entitle them to sue him at once as for their moneys, but that such funds must be considered as belonging to the county council, whose duty it is to appropriate them as by law directed; and therefore, *Held*, that an action for money had and received would not lie against the treasurer, at the suit of a township municipality, for moneys paid over by him, before such appropriation, to the township Reeve, who had misapplied them.

Quære, whether an action would lie against the treasurer in any case for non-payment, or whether he could discharge himself by payment to the Reeve.—*Corporation of the Township of Nottawasaga v. Boys*, 106.

2. *Arrears of taxes on non-resident lands—Levy after lands occupied and assessed as such—32 Vic. ch. 36, sec. 126, Ont.*

Where lands, which had been assessed as non-resident, became occu-

pied and assessed as such, *Held*, not competent for the treasurer. under sec. 126 of 32 Vic. ch. 36, Ont., to issue his warrant to levy arrears accrued when the lands were non-resident, the 111 to 117 sec. of the Act providing for that event.—*Snyder v. Shibley*, 578.

NONSUIT.

See VARIANCE.

NOTICE.

Of by-law, for aid to Railway Company.—See BY-LAW, 1.

To bank, of revocation of transfer of deposit receipt for money.—See DEPOSIT RECEIPT.

NUISANCE.

Posts supporting railway sign-board not indictable nuisance.—See RAILWAYS AND RAILWAY COMPANIES.

OFFICIAL ASSIGNEE.

Insolvent Act of 1869—Appointment of official assignee—Right to goods seized by sheriff under fi. fa.—Pleading.

The County Judge of a County, in which no Board of Trade existed, appointed an official assignee for the County within three months after the Insolvent Act of 1869 came into force: *Held*, that such appointment was valid under section 31 of the Act, although a Board of Trade existed in an adjoining County, but had not appointed an assignee.

Quære, can a Board of Trade appoint an official assignee under section 31, after the lapse of three months from the time when the Act came into force?

When an assignment is made under the Insolvent Act of 1869, it is the duty of the sheriff, who has seized goods under a *fi. fa.* against the insolvent, to surrender the goods to the assignee, leaving the execution plaintiff to assert his privilege for costs, if any he has, in the proceedings in insolvency.

In pleading to a declaration, charging a sheriff with neglecting to make the money under a *fi. fa.*, an allegation that the execution debtor made an assignment under the Insolvent Act of 1869 to an official assignee for the County, appointed under the Act by the County Judge, and that the sheriff had surrendered the goods to the assignee, is sufficient without alleging that no Board of Trade existed in the County, or in an adjacent County, or that no assignee had been appointed by a Board of Trade; and it would be sufficient to aver that the assignment had been made to an official assignee for the County, without shewing how the assignee was appointed.—*Blakely v. Hall*, 138.

OSGOODE HALL.

Repairs—Liability for—Estoppel in pais.

Held, affirming the judgment of the Court of Common Pleas, 20 C. P. 490, Gwynne, J., dissenting, that the Law Society were not released, under the facts and circumstances there set forth, from their covenant to repair and maintain the building known as "Osgoode Hall," for the accommodation of the Superior Courts of Common Law and Equity, and that no estoppel arose, in favour of the Society, against the Crown, in consequence of the several Acts of the Legislature that had

been passed in relation thereto.—*Regina (Respondent) v. The Law Society (Appellants)*, 229.

PAROL EVIDENCE.

Right of mortgagee of vessel, insured in his own name only, to recover mortgagor's interest also, on parol evidence of the latter's interest having been insured.—See MARINE INSURANCE, 2.

PARTICULARS.

Arbitration—Construction of particulars and of reference—Application to revoke.

The particulars in an action on the common counts were headed "Detailed statement of extra work performed by P. R. (plaintiff) on sections 3 and 4, Bruce Gravel Roads, under contract of 1866:" *Held*, that this did not necessarily restrict the plaintiff to work done under the sealed contract of that year entered into between the parties, but that he might shew that any work mentioned in the particulars was done outside of such contract, and under a wholly separate and independent one.

Held, also, that under the declaration the plaintiff clearly could not recover for damages of any kind; and the plaintiff's counsel having admitted this, the Court would not revoke the submission on the ground, amongst others, that such a claim was being entertained by the arbitrators.

The reference was expressed to be "subject to such points of law as will properly arise on the pleadings and evidence;" *Held*, that this rendered it imperative on the arbi-

trators to state for the Court any legal point raised, and to distinguish, if required, the subject for which they awarded in plaintiff's favour, if any legal question was raised applicable thereto.—*Ross v. The Corporation of Bruce*, 41.

PATENT OF INVENTION.

Agreement to pay assignee for right of manufacture—Invention not new—Pleading.

Declaration, that defendant by deed covenanted with plaintiff to manufacture, within a year, at least 100 machines, and to pay to plaintiff every three months, during the first nine months of said year, \$2 for every machine made and sold; and at the end of the year to pay \$2 for every machine made and not sold during the first nine months of said year: *averment*, that all things, &c., and defendant had made 200 machines, but had not paid, &c.

Plea, that by said deed it was recited that Letters Patent had been granted to A. for a "new and useful, &c.," being the machine mentioned, of which A. claimed to be inventor; and by said deed it was recited that plaintiff was assignee of said Letters Patent, and the rights conferred, and plaintiff, as such assignee, contracted with defendant for the sale of the exclusive right of making, &c., said invention in, &c., &c.; that by said deed plaintiff pretended to grant and assign to defendant said rights so contracted for, &c.: *averment*, that after making said deed defendant discovered that invention not new:

Held, on demurrer, plea bad.—*Gray v. Billington*, 288.

PAYMENT.

By bank after notice of revocation of transfer of deposit receipt for money.—See DEPOSIT RECEIPT.

PLEADING.

See OFFICIAL ASSIGNEE.

- " PATENT OF INVENTION.
- " VARIANCE, 1.
- " ATTORNEY.
- " INSOLVENCY.
- " INDICTMENT.
- " INSURANCE, 2.
- " DEBT ON BOND.
- " SCHOOL RATES, 1.

PRINCIPAL AND AGENT.

1. *Sale of goods—Excess of authority.*

Defendant, living in London, and having 5,000 bushels of barley in his elevator there, employed A. & K., brokers in Toronto, to sell the same, giving them a sample. On 8th June, A. & K. wrote defendant, "We have put under offer, subject to your approval, your lot of barley, say 4,000 to 5,000 bushels, cash 50c. net to you in your elevator; answer to be given to morrow, if accepted." On 9th, defendant answered by letter, giving his approval, which was received on 10th, and, on 11th, a contract for the sale of the barley to plaintiff was signed by him and A. & K., brokers for defendant, no counter instructions having been received by them. Plaintiff had seen the letters of the 8th and 9th before the contract was signed:

Held, that A. & K.'s authority was to sell on the terms mentioned on 10th, and that defendant was not

liable on the contract of 11th.—*Farrell v. Hunt*, 117.

2. *Purchase of goods—Special authority—Ratification.*

Defendant, on 2nd July, addressed a letter to his agent in these words : “ You better see what you can secure 1,000 barrels more of the best oil at, or, if there be a tank that you come across with from 2,000 to 5,000 genuine oil, I would buy it, and pay, say, \$1,000, \$2,000, or \$3,000 down, or, if need be, the whole. I don’t think oil can be much higher, but I don’t look for it to be cheaper ; therefore, would not think it bad policy to secure enough to keep me running through the winter. Please post me what you can : ”

Held, that no special authority was conferred by this letter to purchase 3,000 barrels from plaintiffs.

Defendant’s agent having, on 2nd or 3rd July, telegraphed him that he had bought 3,000 barrels from plaintiffs, defendant, on the same day, replied that he did not want 3,000 barrels, and also wrote that he was almost afraid he could not “ tackle ” the oil just then ; that he (agent) no doubt thought he was buying cheaply, or he would have advised with him before closing, but that, as some time had elapsed since he had communicated with him on the subject, it would only have been proper to have done so before closing the transaction, and that, meantime, he preferred not having it ; requesting him, at the same time, to write him all about the market products, and he would in return write him his matured opinion. It further appeared that defendant was wholly ignorant of the terms of the contract, with the exception of price

and quantity, but as soon as made aware of them he told the latter to go back and see plaintiff, and try to get out of the contract, which, according to agent’s own evidence, he, defendant, had already repudiated ; and defendant explained this interview thus, that he told the agent he would not take the oil, and that he had better see if he could not himself get out of it, and that he would go and see plaintiff. On 28th July defendant wrote plaintiffs, repudiating the contract, and the agent’s authority in making it :

Held, no ratification of the contract.—*Prince et al. v. Lewis*, 63.

PROMISSORY NOTE.

Accommodation note—Indorsement after maturity contrary to agreement, and with notice—Want of notice of dishonor—Equitable pleading.

To an action against the maker and endorser of a promissory note, the maker pleaded, on equitable grounds, first, that there was an agreement not to negotiate the note after maturity ; that the note was first indorsed to the plaintiff, as in the declaration alleged, after maturity, with notice of its being an accommodation note ; and thirdly (the second plea not coming in question), that the note was indorsed by the payee to one R., who had notice of its being an accommodation note, and that defendant was only security for the payee ; that R. held it till, at and after maturity, but did not notify the payee as indorser, who never received notice, and defendant was thereby discharged ; and that the note was indorsed to plaintiff after maturity, with notice that it was an accommodation note :

Held, on demurrer, that the first plea was good, but the other bad.—*Grant v Winstanley et al.*, 257.

2. *Action on promissory note—Plea denying affixing of double stamps—Evidence—Notice of insufficiency of stamps when note endorsed—Right to recover.*

In an action on a promissory note, by a subsequent holder, the only question raised by the plea was, whether or not, when he became the holder or received the note, the plaintiff had complied with the Act by availing himself of the privilege of affixing the double stamps, the note having been formerly held to have been insufficiently stamped in the hands of a previous holder, who had in consequence failed to recover upon it.

The evidence, however, clearly shewed that when the note was received by the plaintiff, which he swore it was in good faith and for value, he did affix the double stamps, which were also duly cancelled, *but that he was aware, when he took it, of the former difficulty about the stamps.*

Held, that the defendant could not avail himself, under the pleadings, of this fact, if a defence, but that, as the record stood, plaintiff came within the protection of sec. 9 of 27 and 28 Vic. ch. 4.—*Kirby v. Hall*, 377.

3. *Express Co.—Contract to carry and present note for payment—Delivery to Notary—Failure to notify indorser of non-payment—Company not liable.*

Plaintiff sued defendant, agent of an express company, on alleged undertaking by defendant to take

and carry a copy of a lost note and present it for payment, and in case of non-payment to notify the indorsers, and to take all necessary steps to notify them thereof, averring the delivery of the note to defendant, with *breach*, that defendant did not present or notify, nor take any steps to notify the indorsers of non-payment, in consequence of which the indorsers availed themselves of their discharge from liability, and refused to pay the note. The evidence shewed no demand by plaintiff upon the indorsers for payment, nor refusal by them to pay. It moreover appeared that defendant did convey the copy of note to the place agreed upon, and there placed it in the hands of a notary for presentment and protest, in case of non-payment, and that, though the notary did present, he neglected to notify the indorsers in due time of the non-payment. Defendant pleaded that he did not promise as alleged, and that he did duly present :

Held, that defendant was entitled to a verdict ; for that he had fulfilled his contract by carrying the note to the place agreed upon, and placing it in the hands of a notary for presentment and protest,—*McQuarrie v. Fargo*, 478.

Equitable plea, by indorser, of agreement by plaintiffs to realize collateral security.]—See COLLATERAL SECURITY

See COMMON MONEY COUNTS.

PUBLIC SCHOOLS.

Alteration of sections no answer to mandamus on trustees to levy rate.]—See SCHOOL RATES, 2,

RAILWAYS AND RAILWAY COMPANIES.

Posts on highway supporting signboard—Damages to plaintiff—Company not liable.

Where the plaintiff's horse, which she was driving along the highway, became frightened, and the vehicle, to which it was attached, was in consequence brought into collision with one of the posts supporting the "signboard" required by the statute (C. S. C. ch. 66) to be erected across the highway, and damage resulted to the plaintiff: *Held*, that defendants would not be liable, merely for putting the posts in the highway, as the law allows them so to do, provided they place them in a reasonably proper manner, with a due regard to all the surrounding circumstances, although the posts necessarily obstruct the use of the road over the spots where they are placed.

Held, also, that the posts would not necessarily be an indictable nuisance.

Held, also, that it would have been no objection to the plaintiff's right to recover, that the posts had been erected more than six months before the cause of action arose.—*Soule v. Grand Trunk Railway Company*, 308.

See BY-LAW, 1.

RATIFICATION.

See PRINCIPAL AND AGENT, 2.

REFERENCE (TO ARBITRATION.)

Construction of.—See PARTICULARS.

REGULÆ GENERALES, 436.

RELEASE BY OPERATION OF LAW.

County buildings—Separation of city from county for judicial purposes—Agreement to pay for use of court-house—Release by operation of law.

In consequence of the separation of the City of Toronto from the County of York for judicial purposes, a deed was executed between the respective corporations, in which the city covenanted to pay the county a certain annual sum for the use of the court-house. The deed also contained other agreements as to use of gaol. This arrangement was to continue in force until twelve months' notice to determine it should be given. By the "Law Reform Act," which came into force in February, 1869, the city was re-united to the county for judicial purposes, and on 21st March, 1869, the city gave the county the stipulated notice as to intended discontinuance of use of gaol, stating that, as to the court-house, the action of the Legislature had virtually terminated the provision respecting it, and that no further payment would therefore be made :

Held, that the city had been released from its covenant to pay for the court-house by the Law Reform Act, and also that there was no liability for an aliquot portion of the half-year's rent which would have become due on 21st March following.—*The Corporation of the County of York v. The Corporation of the City of Toronto*, 95.

RENT.

Distress for, upon wife's goods.—See MARRIED WOMAN, I.

Wife's receipt of, after expiry of term, creates yearly tenancy.]—See MARRIED WOMAN, 2.

Aliquot portion of.]—See RELEASE BY OPERATION OF LAW.

REPLEVIN.

Sale and delivery of goods—Receiver—Wrongful removal by.

Plaintiffs contracted with V., who was at the time in partnership with L., for the sale and delivery to them of a quantity of timber. Subsequently L. obtained a decree in Chancery against V., which, after declaring them to have been partners in getting out the timber, directing an account, and restraining V. from removing or intermeddling with the timber, referred the suit to the Master to appoint a Receiver. Before this decree was acted upon by L., V. delivered the timber, as the jury found, to the plaintiffs, by whom, as they also found, it was accepted without objection on L.'s part, who in fact was present at the time. Some months after this, a Receiver was appointed under the decree in Chancery, and, at L.'s instance, he took possession of the timber in question :

Held, that the Receiver's act was wrongful, as the property in the timber had passed to plaintiffs before his appointment, and that they could therefore maintain replevin against him and L. for it.—*Campbell et al. v. Lapan et al.* 363.

See SCHOOL RATES, 1.

RESCISSION OF CONTRACT.

Goods sold and delivered—Non-acceptance of draft.

Defendant bought from plaintiff a quantity of oil at four months' credit.

Plaintiff delivered oil, but defendant refused to accept a four months' draft for the price, alleging that it was not according to sample. Plaintiff assented, and requested defendant to return oil, which defendant promised, but failed to do within a reasonable time. Before the four months had expired plaintiff sued for goods sold and delivered :

Held, that the original contract had been rescinded, and that plaintiff might sue upon a new contract arising out of the retention of the oil by defendant. — *Thompson v. Smith*, 1.

REVOCATION.

Of submission to arbitration.]—See PARTICULARS.

Of transfer of deposit-receipt for money, and payment after notice of, revocation.]—See DEPOSIT-RECEIPT.

ROAD ALLOWANCES.

Passage of by-law by municipality—Liability of timber licencees for trespassing on.

Held, affirming the judgment of the Court of Common Pleas, 20 C. P. 369, that municipal corporations are entitled to the timber and trees growing upon the original road allowances, though, in order to dispose thereof by sale, or to prevent or punish trespassers, a by-law or by-laws must necessarily be passed ; and that therefore an action will lie, at their suit, under the circumstances set forth in the *head-note* to the case in the Court below.

Held, also, that the licenses granted to the defendants in this case did not authorize them to cut and carry away the timber and trees from the road

allowances in question.—*The Corporation of the Township of Barrie (Respondents) v. Gillies et al. (Appellants)*, 213.

ROAD COMPANY.

Road running partially through town—Right to collect tolls within limits of town.

A joint stock road company had begun operations, and were in receipt of tolls, several years before the town of Clifton was incorporated, within which part of the road ran: *Held*, affirming the judgment of the Court of Common Pleas, 20 C. P. 107, that the company had a right to levy tolls within the town limits, notwithstanding the incorporation, and that some of the toll gates were within the town limits.—*The St. Catharines, Thorold, and Suspension Bridge Road Company (Respondents) v. Gardner (Appellant)*, 190.

SALE OF GOODS.

Sale of goods subject to lien—Notice to purchasers—Right of action against.

Held, that where there was an express agreement between the owner of certain logs and the plaintiff that he would sell the logs subject to plaintiff's charges thereon for rafting, which agreement was communicated to defendants, the purchasers, who promised plaintiff, before the delivery by him to them of the whole of the logs, to pay said charges, plaintiff was entitled to maintain an action against defendants for non-payment of the same.—*Jackson v. Evans et al.*, 33.

See TROVER.

“ REPLEVIN.

“ PRINCIPAL AND AGENT, 1.

SALE OF LAND FOR TAXES.

Insufficient description.

Held, in ejectment, that a sale of land for taxes to defendant, the only description of which, in the *Canada Gazette* and in the treasurer's warrant, was, “Pt. of S. pt. 1st con. Tay, 40 acres, \$12.95,” could not be supported, and that therefore the plaintiff was entitled to recover.—*Grant v. Gilmour*, 18.

Construction of 33 Vic. ch. 23, (Ont)].—See TAX SALE.

SCHOOL RATES.

1. *Replevin—Distress for School rates—Levy according to valuation of part only of taxable property—Exemption as contributing to Protestant separate school—Pleading.*

In replevin for plaintiff's goods, defendant made cognizance justifying as bailiff of a collector of school rates under a warrant from him. Plaintiff pleaded, first, that the rate was bad, as not being levied according to the valuation of the whole taxable property in the school section, as expressed in the assessor's and collector's rolls, pursuant to the statute, but that it was levied wrongfully upon only three-fourth parts of such taxable property; secondly, that at the time said rate was imposed, there was a Protestant separate school which had been long before established, and that plaintiff for a long time before the imposition of the rate had been, and at the time of its imposition was, sending his children to said separate school. To the first plea, defendant replied that the rate was duly imposed, because at the time of its imposition and long before there was a union separate school of the townships of, &c., for

coloured people, the limits of which took in the whole of the section in which plaintiff resided, and the trustees of said section properly omitted the names of the coloured people in said section from said rate-bill.

Held, on demurrer, reversing the judgment of the County Court, that the first plea was good, but the second, bad. *Held*, also, affirming the judgment of the County Court, that the replication to the first plea was bad.—*Harling v. Mayville*, 499.

2. *School trustees — Judgment against — Alteration of sections — Mandamus to levy rates for payment of.*

The plaintiff recovered a judgment in March, 1858, against the school trustees for a debt due to him for building a school-house for the section, and made several unsuccessful attempts to obtain payment of it from the trustees and their successors in office. The trustees always refused to levy a rate, or to pay the judgment. To an application for a *mandamus* to compel the trustees to levy a rate for payment of the judgment,

Held, no answer that since the recovery of the judgment two alterations had been made in the limits of the section, and that many changes had taken place among the rate-payers originally liable; or that the merits of the claim upon which the judgment was founded were capable of being impeached.—*Scott v. The School Trustees of Burgess and Bathurst*, 398.

SEAL.

Absence of from by-law, when submitted to electors, no objection.]—*See BY-LAW*, 1.

SEAWORTHINESS.

Evidence of.]—*See MARINE INSURANCE*, 1.

SECONDARY EVIDENCE.

Ejectment — Secondary evidence of will — Colourable judgment — Conveyance to consuror of.

In ejectment, it having been proved that defendant had the will, on which plaintiffs' title depended, in his possession when it was last seen, that notice to produce it and also a *spa. duces tecum* had been served upon him, and that, not having produced it, the registrar of the county was called, who produced a memorial of it, which was proved by one of the witnesses thereto, who also swore that he saw one McAlinder draw the will, and the latter swore that the memorial was a true copy of the will, which had been executed in his presence and that of another witness, *Held*, that this evidence had been properly admitted.

A deed of the land in question, from the testator to one Pierce, was produced by defendant, which had never been registered, and under which the grantee had never taken possession, the testator having himself retained possession down to his death, and his widow and devisee for life having continued in possession under the will, which she registered, in all a period of twenty-seven years: *Held*, that the title of the plaintiffs, who claimed under the deceased, in remainder, under the will, was not defeated by the deed to Pierce, for that, even if that deed was a *bona fide* one, whatever estate was conferred by it, was lost by the twenty-seven years adverse possession re-

tained by the testator and his devisee for life.

A sheriff's deed of the same land to one Burrowes was produced by defendant, from which it appeared that the sheriff, under a *fi. fa.* lands against defendant, as executor, and his wife (the widow of the testator), as executrix of the testator, sold to Burrowes, who conveyed to defendant. The judgment upon which the writ issued had been obtained upon a cognovit in an action by one Buell against defendant and his wife, as executor and executrix, for goods sold and delivered by Buell to them, as executor and executrix, and on an account stated; but defendant and his wife were not the executors appointed by the will, of which defendant was aware, as he had the will in his possession: *Held*, that this deed could not defeat the plaintiff's right to recover.—*Hamilton et al. v. Lightbody*, 126.

SECURITY.

Taken by attorney or counsel from client, in what cases invalid.—See ATTORNEY.

SEIZURE (OF GOODS).

See EVIDENCE.

SEPARATION DEED.

Husband and wife—Deed of separation—Provision for children—Reconciliation—Non-avoidance of deed—Release of dower, after subsequent separation, at husband's instance—Revival of deed.

A deed of separation between husband and wife, where the estate is conveyed to the wife for life, with remainder to the children of the

marriage on her death, is not avoided by the subsequent reconciliation of the parties, as the interests of the children intervene to preserve the deed.

Seemle, that where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, and she does so, after reconciliation and separation, at his instance, the deed is thereby revived.—*McArthur v. Webb et al.* 358.

SESSIONS.

Order of, to pay costs of appeal.—See JUSTICES OF THE PEACE.

SHERIFF.

Duty of, to surrender goods seized on execution against insolvent to official assignee, &c.—See OFFICIAL ASSIGNEE.

SPECIAL CASE.

In County Court, not cognizable in Superior Court.—See LAW REFORM ACT.

STATUTES (CONSTRUCTION OF).

7 *Wm. IV. ch. 19.*—See TAX SALE.
C. S. C. ch. 6, sec. 55, sub-sec. 3.]—See INDICTMENT.

C. S. U. C. ch. 45.]—See CHATTEL MORTGAGE, 1, 2.

Con. Stats. U. C. ch. 73.]—See MARRIED WOMAN, 1, 2, AND HUSBAND AND WIFE.

Con. Stats. U. C. ch. 126, sec. 8.]—See JUSTICES OF THE PEACE.

22 *Vic. ch. 66, secs. 75. 76.*—See BY-LAW, 1.

27 & 28 *Vic. ch. 4, sec. 9.*—See PROMISSORY NOTE, 2.

27 & 28 *Vic. ch. 85, sec. 21.*—See BANKS.

29 *Vic. ch. 37, sec. 5.*—See INSURANCE, 2.

29 *Vic. ch. 38, sec. 5.*—See MUTUAL INSURANCE.

29 & 30 *Vic. ch. 51, sec. 196, subsecs. 6, 7.*—See BY-LAW, 1, 2.

29 & 30 *Vic. ch. 51, sec. 296, subsecs. 11, 12.*—See BY-LAW, 5.

31 *Vic. ch. 30, sec. 32 (Ont.)*—See BY-LAW, 5.

32 *Vic. ch. 7, sec. 16 (Ont.)*—See DOWER.

32 *Vic. ch. 32, sec. 10 (Ont.)*—See BY-LAW, 4.

32 *Vic. ch. 32, sec. 23 (Ont.)*—See CONVICTION.

32 *Vic. ch. 36, sec. 126 (Ont.)*—See NON-RESIDENT LAND TAX, 2.

32 *Vic. ch. 43 (Ont.)*—See BY-LAW, 3.

32 & 33 *Vic. ch. 31, secs. 74, 75.*—See JUSTICES OF THE PEACE.

33 *Vic. ch. 23 (Ont.)*—See TAX SALE.

section of the Act, in cases where he has paid eight years taxes charged on the lands, to prove that the taxes so paid had been legally charged, but the production of the Treasurer's books, shewing that such taxes had been charged and paid, is sufficient.

Under that Act any person claiming under the tax purchaser may avail himself of the provisions of the Act.

The description in the Sheriff's deed was "75 acres of the front part of the west half of lot No. 5, in the 1st Concession of the Township of Winchester: *Held*, sufficient under 7 Wm. IV. ch. 19.—*Fraser v. West*, 161.

SURETY.

No right to call on creditor, holding collateral security for debt, to realize security on default of debtor.—See COLLATERAL SECURITY.

TENANCY.

Yearly, created by wife's receipt of rent after expiry of term.—See MARRIED WOMAN, 2.

See LANDLORD AND TENANT, 2.

TAXES.

Levying arrears, accrued while lands non-resident, after same occupied.—See NON-RESIDENT LAND TAXES, 2.

See SALE OF LAND FOR TAXES.

TIMBER.

Right of municipal corporations to, on road allowances.—See ROAD ALLOWANCES.

TIMBER LICENSES.

Do not authorize the cutting and carrying away of timber from original road allowances.—See ROAD ALLOWANCES.

TAX SALE.

Sale of land for taxes—Defects attending sale.—33 *Vic. ch. 23, Ont.*—*Description in Sheriff's deed.*—7 Wm. IV. ch. 19.

It is not incumbent, under 33 *Vic. ch. 23, Ont.*, for the tax purchaser, for the purpose of bringing himself within the protection of the first

TOLLS.

Right of Road Co. to levy within limits of town subsequently incorporated.—See ROAD CO.

TRESPASS.

Lots with double fronts—Road unauthorized by by-law.

Where half lots, under the double-frontage system of survey, did not correspond or meet in any point, and land was taken by the municipality from the plaintiff's lot, in order to make a road to join the side line road allowances, without the passage of any by-law for the purpose, *Held*, that there was no power so to do, and that trespass would lie against the municipality.—*Taylor v. The Municipal Corporation of the Township of Verulam*, 154.

Against timber licensees, at suit of municipal corporations, for cutting timber on original road allowances.]—See ROAD ALLOWANCES.

Evidence of liability for seizure of goods.]—See EVIDENCE.

See REPLEVIN.

TROVER.

Sale of goods—Payment on account—Removal by third party—Trover.

Plaintiff, through his agent, bought from A. & Co. a certain quantity of wheat, which was to be loaded on or before a day named, or as soon as bags and cars could be furnished by plaintiff for same. Plaintiff paid on account portion of the price agreed upon and furnished bags to the vendor, who filled them, but no cars were sent by him to take the wheat away. Whilst the wheat was lying ready to be despatched, and after the day named for loading it, defendants, holders of a warehouse receipt, demanded of the vendors the

wheat covered by it, when plaintiff's wheat, some of which, amounting to 250 bushels, had been weighed, was delivered to and received by them. There was no demand and refusal of plaintiff's wheat, nor did plaintiff notify defendants that the wheat was his.

Held, that plaintiff was not entitled to possession of the wheat, and could not, therefore, maintain trover against defendants for it.—*Butters v. Stanley et al.* 402.

See CHATTEL MORTGAGE, 2.

USER.

Of road by public.]—See HIGHWAY.

VARIANCE.

Demise of mill—Covenant equitably to adjust rent up to time of destruction — Construction — Variance.

In an action on a demise by deed of a mill and premises, the declaration, after setting out the demise from 15th December, 1868, to 30th December, 1877, at a rental of \$1,100, payable half-yearly in advance, on 15th December and 15th June, proceeded to state that in case the mill should be totally destroyed through accidental fire, &c., the term created should at once cease, and the rent should be adjusted at what, on a just apportionment, should be found to be the due proportional part thereof up to that time, and should be apportioned between the parties accordingly: *Averment*, of payment until destruction by fire of all rent up to that time due, including the half-yearly payment due and payable in

advance for the half-year commencing on 15th June, 1869, and that during continuance of demise and currency of said half-year of said term, commencing on said 15th June, said mill was, on 30th October, 1869, totally destroyed by accidental fire, whereupon said term immediately ceased, and plaintiff became entitled to have said rent adjusted and apportioned as aforesaid, and defendant became liable to refund and repay to plaintiff so much of said rent so paid in advance by plaintiff as, on a just apportionment thereof, should be found to be in excess of said rent beyond the due proportional part thereof down to said 30th October; and that on this day the sum of \$137.50 was the sum which, upon a just apportionment of the rent reserved, would be and was the amount of said rent so paid in advance by plaintiff over and above a due proportional part of said rent down to said 30th October, and all conditions, &c., yet defendant had not paid the same.

The words of the lease produced at the trial were, "and in case of the total destruction thereof, &c., &c., the term hereby created, &c., and the proportion of rent up to that time shall be adjusted equitably between the parties :"

Held, reversing the judgment of the County Court, that there was no such variance between the legal effect of the instrument declared on and that produced in evidence as entitled defendants to nonsuit the plaintiff.

Held, also, that no averment of an actual surrender of the demised premises, as a condition precedent to the cause of action accruing, was necessary.—*Hortop v. Taylor*, 56.

VOTERS' LIST.

Under 29 & 30 Vic. ch. 57, sec. 196, sub-sec. 7.]—See BY-LAW, 2.

VOTERS.

Recording names of voters refusing to swear, not an indictable offence.]—See INDICTMENT.

WAIVER.

Mining leases—Verbal agreement for sale of—Defect in title.

Plaintiff, having verbally agreed with defendant for the purchase from him of an interest in certain mining leases, discovered, within a short time after a payment made by him on account, that there was some defect in the title, but he never repudiated the bargain until just before action brought, on the contrary, continued to act as if the bargain was valid: *Held*, that he could not recover back the money paid by him, and that the agreement's being a verbal one could not avail him, defendant having sworn that he was ready and willing to carry out his engagement and convey, as agreed upon.—*Patterson v. Irwin*, 132.

WARRANT.

Of commitment under 32 & 33 Vic. ch. 31.]—See JUSTICES OF THE PEACE.

WARRANTY.

In an action on a mutual fire insurance policy a representation of present cash value is not a warranty.]—See INSURANCE, 1.

WIFE.

Her receipt of rent, with husband's assent, after expiry of term, creates yearly tenancy.]—See MARRIED WOMAN, 2.

Liability of husband for goods ordered by.]—See HUSBAND AND WIFE.

WILL.

1. *Will—Construction—Executory devise*—OR, *when to be read AND.*

By his will, dated 28th January, 1840, testator devised as follows: "I will and devise to my son C. all and singular, &c. (certain land), to be by him peaceably possessed and enjoyed for and during his natural life, and after his decease I will and devise the same to the heirs of the said C., and to their heirs and assigns for ever; in consideration whereof I will, order, and direct, that the said C. shall pay yearly and every year unto his mother the sum of £25 during her widowhood; and also that he shall pay to his sister M. the sum of £25 yearly and every year, so long as she shall remain single." Then followed a devise to his son I. B. of certain lands in similar words, with a like charge in favor of his brother, and sister M.

The will further provided, "I also declare it to be my will and desire that the timber on the two farms aforesaid shall be equally divided between my two sons C. and I. B., as they may think proper, and that that division shall remain permanently established for them and their heirs, and for the heirs and assigns of the heirs of the said C. and I. B.;" and then, after certain devises and bequests to others of his

children, including a gift of \$500 to his son R., there was this further provision, "And in the event of either of my daughters S. or M., dying before they come of age, or without issue, then and in such case the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike."

At the date of the will C. and I. B. were over 21 years of age, and R. was under 21 years of age:

Held, that C. took an estate in fee, subject to an executory devise over in the event of his dying without leaving lawful issue; and that in his case *or*, in the clause creating the executory devise, could not be read *and*.

Per *Gwynne, J.*, that the clause was to be read, "and in the event of my son C. dying without lawful issue, and in the event of my son I. B. dying without lawful issue, and in the event of my son R. dying before coming of age, and without lawful issue," &c.—*Forsyth v. Galt et al.* 408.

2. *Will—Intestacy—Fee simple—Life estate—Construction.*

A testator devised his property to his wife for life, provided she remained unmarried; but if she married, it was at once to be equally divided amongst his children: if, however, she should continue his widow, and be guilty of no misconduct, then it was to be at her disposal, without the hindrance or molestation of any person whomsoever; with a final declaration that it was not to be disposed of or rented during the devisee's life. The widow remained unmarried.

Held, per *Hagarty, C. J.*, that the widow had no such power; that

there was either an intestacy, as to the fee, on her death, or the children took on her death, as they were to take on her marrying again ; and that the latter was, on the whole, the truest construction.

Per Gwynne and Galt, JJ., that the widow took either a fee simple

estate, or an estate for life, with power to dispose of the fee.—*Burgess v. Burrows*, 426.

See SECONDARY EVIDENCE.

WORDS (CONSTRUCTION OF).

Majority..]—*See* BY-LAW, 1, 2.

